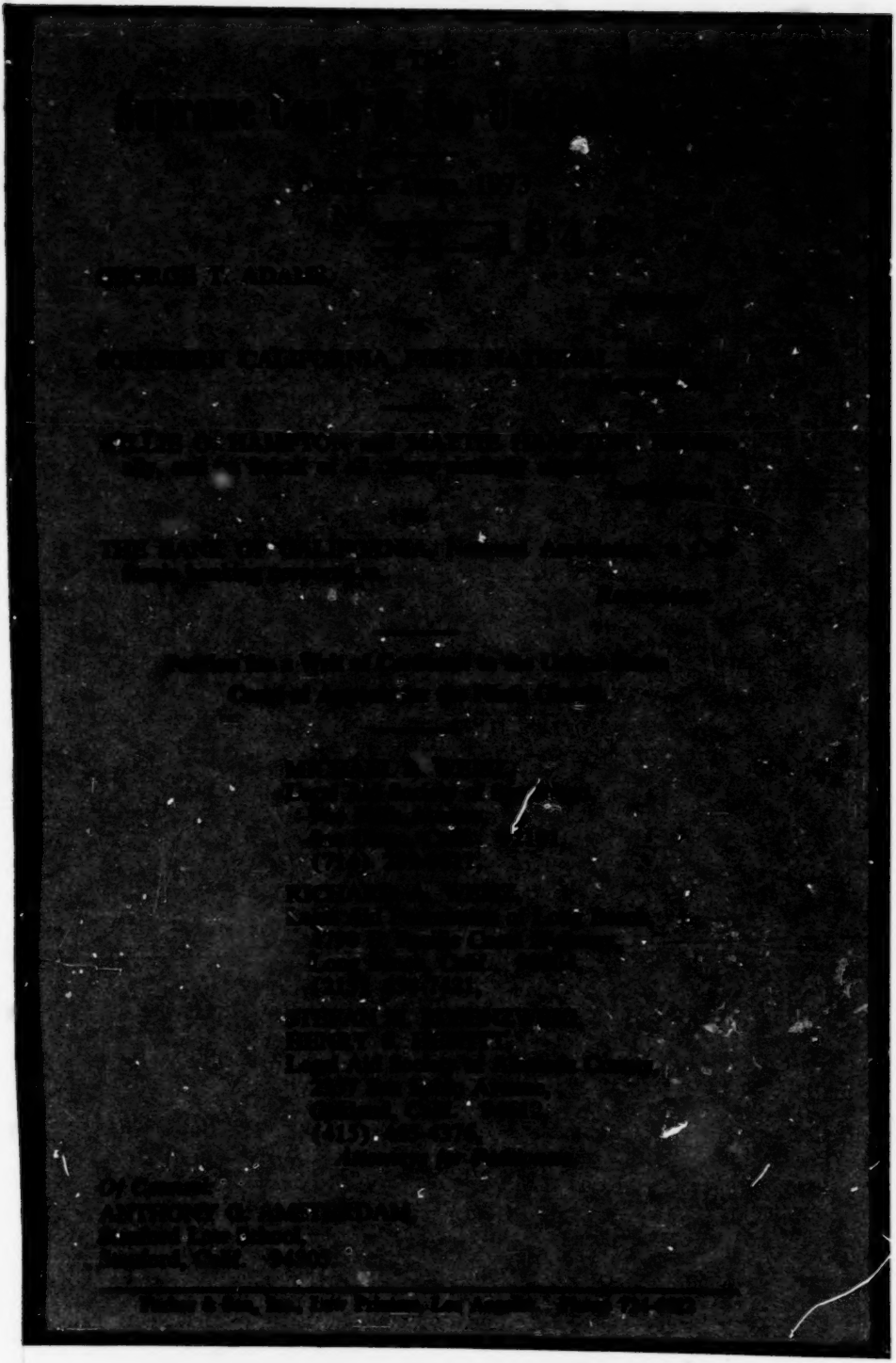

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

GEORGE T. ADAMS,

Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,

Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON, Individually, and on behalf of all others similarly situated,

Petitioners,

vs.

THE BANK OF CALIFORNIA, National Association, a California banking corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, George T. Adams, Willie O. Hampton and Mattie Hampton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these cases on October 4, 1973.

Opinions Below.

The opinion of the Court of Appeals and the dissenting opinion of Byrne, J., reported at 492 F. 2d 324 (9th Cir. 1973), is attached to this petition as Appendix A. The order of the Court of Appeals, on suggestion of *en banc* consideration and the dissenting

opinion of Hufstedler, J., also reported at 492 F. 2d 324 (9th Cir. 1973), is attached as Appendix B. The opinion of the United States District Court for the Southern District of California in *Adams v. Southern California First National Bank*, reported as *Adams v. Egley, et al.*, at 338 F. Supp. 614 (S.D. Cal. 1972), is attached as Appendix C. The order of the United States District Court for the Northern District of California in *Hampton v. The Bank of California*, which is not reported, is attached as Appendix D. The order in *Hampton, supra*, incorporates the decision in *Oller v. Bank of America*, reported at 342 F. Supp. 21 (N.D. Cal. 1972), attached as Appendix E.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 4, 1973. A timely petition for rehearing *en banc* was denied on March 12, 1974, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the extrajudicial repossessions of debtors' property, as expressly authorized and governed by California's statutory repossession scheme which promotes significant state interests by delegating state power to ostensibly private parties, constitutes state action within the Fourteenth Amendment and action under color of state law within Rev. Stat. Sec. 1979, 42 U.S.C. §1983.

2. Whether the California statutory repossession scheme violates the due process clause of the Four-

teenth Amendment by reason of its failure to require any of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company*, ... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974), including the institution of judicial proceedings with an opportunity to be heard before the debtor is finally deprived of property.

Constitutional and Statutory Provisions Involved.

The following constitutional and statutory provisions involved in these cases are set forth in Appendix F:

(1) U.S. Constitution, Amendment XIV, §1.

(2) Rev. Stat. Sec. 1979, 42 U.S.C. §1983 (hereinafter 42 U.S.C. §1983).

(3) California Business and Professions Code §§7520, 7521(e), 7522 and 7538.2.

(4) California Civil Code §§2982(a)(10)(4), 2983.2 and 2983.3.

(5) California Commercial Code §§9501, 9503 and 9504(1) and (2).

(6) California Vehicle Code §§28, 5600, 5601, 5602, 5909 and 9561.

Statement of the Case.

On June 17, 1968, petitioner, George T. Adams "[i]n need of money for medical bills . . ." (Pet. App. p. 3) borrowed $1,000 from the Bank of La Jolla (predecessor in interest to respondent, Southern California First National Bank). The Bank required Adams to execute a promissory note to repay a total of $1,160.16 and a standard form security agreement drafted in conformity with California Commercial Code

(hereafter "Comm. Code") §§9503[1] and 9504, giving the Bank a security interest in his three motor vehicles —a 1959 Volkswagen van, a 1960 Volkswagen sedan, and a 1961 Volkswagen sedan.[2]

By August, 1970, Adams had repaid over $900.00 of his loan. On August 19, the Bank, having concluded that Adams was in default, caused the nighttime repossession of the 1959 van and the 1960 sedan pursuant to Comm. Code §9503. The repossession was accomplished by Richard Egley, a state licensed repossessor. In the course of the repossession, several items of personal property contained in the vehicles, not covered by the security agreement, were also taken. These items included a municipal business license, a county medical card, a county food supplement identification card, educational materials, and miscellaneous tools.[3]

The two repossessed vehicles were subsequently sold at a private sale by the Bank pursuant to Comm. Code §9504. "After deducting costs of repossession and storage of the vehicles from the proceeds of a private sale,

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[1]Comm. Code §9503 provides in pertinent part:
"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

[2]The contract contained the following language:
"upon the occurrence of any such event of default the *Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code* [Cal. Comm. Code §§9501 et seq.]. . . . Upon the occurrence of any event of default the Secured Party is entitled to take possession of the vehicle . . . and to take such other measures as Secured Party may deem necessary for the protection of the vehicle. . . ." Pet. App. p. 4 (emphasis added).

[3]These items were returned some six weeks after their seizure.

the net recovery amounted to $219.15. This amount when applied against the balance due resulted in a deficiency of less than $1.00 which was cancelled."[4] Pet. App. p. 5.

Petitioner, Willie O. Hampton, purchased a 1967 Buick on September 3, 1969, pursuant to a retail installment contract "which was assigned to [respondent] The Bank of California . . ., and which called for 30 monthly payments of $118.30, or a total of $3,549." Pet. App. p. 5. The contract contained default and repossession provisions drafted in conformity with California Civil Code (hereafter "Civil Code") §2982(a)(10)(4). After making payments for nearly two years, Hampton was allegedly late in submitting his payment for August, 1971. Hampton alleged "that the Bank agreed that he could make up the missed payment at a later date, so long as he kept current on the rest of his payments." Pet. App. pp. 5-6. The next payment was made, but returned to him, and in apparent violation of the agreement, the Bank, pursuant to Comm. Code §9503 and Civil Code §§2981 *et seq.*, repossessed the vehicle "during the night of October 14, 1971."[5] The Bank subsequently mailed Hampton a notice of its intent to sell the automobile (Civil Code §2983.2) unless the contract balance plus collection charges of $946.89 were paid.

Both Adams and Hampton commenced suits in the appropriate federal district courts challenging the con-

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[4]Adams alleged in his complaint that at the time of the sale, the van had a fair market value in excess of the balance of all claims due under the contract and additional costs incurred on repossession and resale.

[5]The record reveals that the repossession actually occurred on October 4, 1971.

stitutionality of the statutory repossession procedures[6] employed by their respective creditors.[7]

On October 23, 1970, Adams filed suit in the Southern District of California seeking damages and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.[8] On February 11, 1972, the district court granted Adams' motion for partial summary judgment and held Comm. Code §§9503 and 9504 invalid on their face as violative of the Fourteenth Amendment's due process clause. The Bank filed a petition for interlocutory appeal, 28 U.S.C. §1292(b), which was granted by the Court of Appeals on March 15, 1972.[9]

On October 18, 1971, Hampton commenced a class action in the Northern District of California seeking injunctive and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.[10] After issuing a temporary restraining order on October 18, 1971, the court, on its own motion, dismissed the action on March 3, 1972, holding that the court lacked

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[6]*Adams* challenged Comm. Code §§9503 and 9504; *Hampton* challenged Comm. Code §9503 and Civil Code §§2982(a)(10)(4), 2983.2 and 2983.3.

[7]Named as defendants in *Adams* were Richard Egley, dba Egley's Recovery Service and Southern California First National Bank; and in *Hampton*, The Bank of California.

[8]Adams invoked the jurisdiction of the court under 28 U.S.C. §§1331 and 1343.

[9]Defendant Egley did not appeal from the district court decision.

[10]Hampton invoked the jurisdiction of the court under 28 U.S.C. §1343.

subject matter jurisdiction. Hampton then appealed from this decision.

The Court of Appeals for the Ninth Circuit consolidated the *Adams* and *Hampton* cases on appeal in an order dated December 15, 1972. On October 4, 1973, a divided panel of the Court of Appeals reversed in *Adams* and affirmed in *Hampton*[11] holding that the state was "not so significantly involved" (Pet. App. p. 8) in the challenged repossession procedures as to sustain a claim under 42 U.S.C. §1983 and the Fourteenth Amendment. A petition for rehearing with suggestion for rehearing *en banc* was timely filed, and denied on March 12, 1974, Judge Hufstedler dissenting.

[11]In affirming *Hampton* the court noted that the proper ground for dismissal was "failure to state a federal cause of action, rather than that the federal court lacked subject matter jurisdiction. *Bell v. Hood*, 327 U.S. 678 (1946)." (Pet. App. p. 28).

REASONS FOR GRANTING THE WRIT.

I.

Review by This Court Is Necessary to Settle Important Issues of Federal Law.

Petitioners challenge California's repossession statutes which require none of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company*, ... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974). Substantially identical repossession procedures have been enacted in virtually every state.[12] Their manifest inadequacies have generated a nationwide attack on the constitutional validity of extrajudicial repossession in both federal and state courts.[13] The result has been a proliferation of decisions which, for the most part, have failed to come to grips with the due process issue because of a supposed lack of state action in the repossession process.

Decisions have been rendered in the United States Court of Appeals for the Ninth Circuit, in the cases *sub judice;* the Eighth Circuit, *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 906 (8th Cir. 1973); *Nowlin v. Professional Auto Sales, et al.*, ... F. 2d ...., Nos. 73-1348, 73-1450 (8th Cir. Apr. 25, 1974); *Nichols v. Tower Grove Bank*, ...

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[12]McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. Cal. L. Rev. 58, 75 (1973).

[13]Counsel are aware of at least 45 cases challenging extrajudicial repossession. These cases are set forth in Appendix G. *Adams* has been the topic of discussion in approximately 35 law review articles, comments and notes. *See, e.g.*, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditors Meet the Constitution*, 59 Va. L. Rev. 355, 372-383; Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. Fla. L. Rev. 60, 107-140; and Symposium, Creditors' Rights, 47 S. Cal. L. Rev. (1973).

F. 2d ...., No. 73-1621 (8th Cir. May 13, 1974); and the Second Circuit, *Shirley v. State National Bank of Connecticut*, ...F. 2d ...., No. 73-1783 (Feb. 14, 1974), *petition for rehearing en banc denied*, ... F. 2d .... (2nd Cir. March 29, 1974).

Decisions are pending in the Fifth Circuit, *James v. Pinnex*, No. 72-1250 (S.D. Miss. Dec. 21, 1972), *appeal docketed*, No. 73-1866 (5th Cir. Apr. 17, 1973); *Baker v. Keeble*, 362 F. Supp. 355 (M.D. Ala.), *appeal docketed*, No. 73-3631 (5th Cir. Nov. 7, 1973); the Third Circuit, *Gibbs v. Titleman, et al.*, 369 F. Supp. 38 (E.D. Pa. 1973), *appeal docketed*, Nos. 74-1062-1067 (3rd Cir. Jan. 15, 1974); and the Sixth Circuit, *Turner v. Impala Motors*, No. C-73-50 (W.D. Tenn.), *appeal docketed*, No. 73-1826 (6th Cir. Aug. 15, 1973).[14]

The opinions of the courts of appeals in *Adams*, *Bichel*, *Nowlin*, *Nichols*, and *Shirley* are marked by a failure to articulate and apply meaningful principles of state action. Rather, the decisions rest on artificial and superficial distinctions which ignore the expansive thrust of this Court's prior decisions. Thus, the instant cases present significant constitutional issues which affect a wide range of cases involving the conduct of ostensibly private parties.[15]

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[14]The district courts in *James v. Pinnex*, *supra*, and *Gibbs v. Titleman*, *supra*, found that the state was significantly involved in the repossessions and held the respective statutory schemes unconstitutional.

[15]*See e.g. Ouzts v. Maryland National Insurance Company*, 470 F. 2d 790 (1972), *vacated for rehearing en banc*, No. 26062 (9th Cir. June 20, 1973) (bail bondsmen's violation of alleged fugitive's due process rights); *Bond v. Dentzer*, ... F. 2d ...., 42 U.S.L.W. 2502 (2nd Cir. Mar. 13, 1974) (upholding New York's extrajudicial statutory wage assignment scheme);

(This footnote is continued on next page)

Recognizing the importance of these issues, the Court has recently granted a petition for a writ of certiorari in *Jackson v. Metropolitan Edison Company*, 483 F. 2d 754 (1973), *cert. granted*, ... U.S. ...., 94 S. Ct. 1407 (1974).[16] *Jackson* presents the state action and due process issues in the context of a publicly regulated utility company's extrajudicial termination of a customer's electrical service. The instant cases pose issues that are like, but not identical to, those in *Jackson*. In order for the Court to get a well-rounded and comprehensive view of these issues and their ramifications, this petition should be granted and these cases set down for argument along with *Jackson*.[17] This would enable the Court to provide instructive general principles to guide the lower courts in resolving questions of state action where ostensibly private parties act in varying contexts pursuant to state regulations designed to promote state policies and interests.

Hall v. Garson, 430 F. 2d 430 (1970), 468 F. 2d 845 (5th Cir. 1972) (invalidating Texas' landlord lien statute); *Adams v. Department of Motor Vehicles*, ... Cal. 3d ...., 113 Cal. Rptr. 145 (1974) (invalidating, in part, California's extrajudicial garagemen's labor and materials lien and sale procedure); and *Barrera v. Security Building and Investment Corp.*, No. 73-B-34 (S.D. Tex. May 3, 1974) (rejecting due process challenge to extrajudicial real property foreclosure statutes).

[16]The Court has also granted a petition for a writ of certiorari in *North Georgia Finishing, Inc. v. Di-Chem, Inc., petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 18, 1974), *cert. granted*, ... U.S. .... (No. 73-1121, May 28, 1974), which presents the due process issue in the context of the prejudgment garnishment of a debtor's bank account.

[17]In *Gonzales v. Automatic Employees Credit Union*, 363 F. Supp. 143 (N.D. Ill. 1973) *question of jurisdiction postponed to the hearing on the merits*, ... U.S. ..., 94 S. Ct. 1467 (1974), appellant's challenge to Illinois' repossession statutes is not clearly presented, as the case involves complicated procedural issues.

II.

The Decision of the Court of Appeals Is Erroneous and in Conflict With Applicable Decisions of This Court.

The matter before the Court concerns detailed state laws and policies which significantly involve the state in objectionable conduct of ostensibly private parties. By focusing on the state's role in such conduct, this Court has developed an expansive body of state action law subjecting so-called private conduct to constitutional scrutiny. The Court has sought to evaluate significant state policies and interests that intrude into private relationships and are reflected in particular conduct. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

By a process of "sifting facts and weighing circumstances"[18] the Court has decided the state action issue in a manner which reflects differing emphases of a singular unifying theme:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of Law.[19]

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[18]*Burton, supra*, 365 U.S. at 722.

[19]This theme is apparent in each of the following approaches to the state action issue employed by the Court: (1) private parties whose conduct is subject to pervasive state regulation. *Public Utilities Comm'n v. Pollak, supra; Burton v. Wilmington Parking Authority, supra; Moose Lodge No. 107 v. Irvis, supra; Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Nixon v. Condon*, 286 U.S. 73

(This footnote is continued on next page)

An examination of the statutory scheme structuring and governing repossession reveals that California has intertwined state policies with ostensibly private conduct:

1. By legislative enactment California authorizes secured creditors to unilaterally determine default and repossess collateral "without judicial process." Comm. Code §9503.

2. The challenged statutes effectively write the default provisions of the security agreement and govern the actual manner of repossession; *i.e.*, Comm. Code §9503 requires repossession "without breach of peace"; Comm. Code §9504 (and Civil Code §2983.2) require that a notice of resale must be sent to the debtor and that the repossessed goods must be sold in a "commercially reasonable manner." Civil Code §2982(a)(10)(4) requires that an automobile retail installment contract must contain a notice to the buyer that upon "default", the vehicle may be repossessed.

3. Repossession is accomplished by state licensed and regulated repossessors. Bus. and Prof. Code

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(1932); (2) private action involving the performance of traditional public functions delegated to private individuals. *Smith v. Allwright, supra; Terry v. Adams, supra; Nixon v. Condon, supra; Evans v. Newton,* 382 U.S. 296 (1966); *Marsh v. Alabama,* 326 U.S. 502 (1946); *United States v. Williams,* 341 U.S. 97 (1950); (3) private action encouraged or compelled by state law and reflecting current state policy. *Reitman v. Mulkey, supra; Adickes v. S. H. Kress & Company,* 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis, supra; Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Lombard v. State of Louisiana,* 373 U.S. 267 (1963); *Robinson v. Florida,* 378 U.S. 153 (1964); *Nixon v. Condon, supra; McCabe v. Atchison, Topeka & Santa Fe R. Company,* 235 U.S. 151 (1914); *Evans v. Abney,* 396 U.S. 435 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948); and (4) private action taken with reliance on state law, custom or usage. *Adickes v. Kress, supra; Evans v. Abney, supra.*

§§7520, 7521(e) and 7522. When property not covered by the security agreement is taken in the course of the repossession, California law requires the repossessor to inventory these goods. Bus. and Prof. Code §7538.2.

4. Vehicle Code §28 requires that the repossessor immediately notify the local police of the occurrence of a repossession.

5. The California Department of Motor Vehicles automatically transfers title of a vehicle to the creditor, after repossession, without the necessity of the debtor's signature on the "pink slip". Vehicle Code §§5600, 5601, 5602, 5909, and 9561.

6. The challenged statutes authorize deficiency judgments as an integral part of the repossession scheme. Comm. Code §9504 and Civil Code §2983.2. This grant of cumulative remedies (Comm. Code §9501) to the conditional seller did not exist at common law. *Johnson v. Kaeser*, 196 Cal. 686, 239 Pac. 324, 327 (1925).[20]

Significant governmental interests and policies are promoted by this statutory scheme. They were perceptively identified by Circuit Judge Hufstedler, dis-

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[20]The court of appeals' conclusion that the state is not significantly involved (Pet. App. p. 8) in repossession is simply a characterization that ignores the real world. Secured creditors organize their business practices in conformity with statutory requirements, and the debtor is stymied at every turn by creditor conduct backed by the force of law.

The existence of a contract, with its common law heritage, does not deter a finding of state action. For the contract itself is shot through with binding statutory requirements, and state action analysis must focus on the state's role in the objectionable conduct. *See New York Times v. Sullivan*, 376 U.S. 254, 265 (1964); *Reitman v. Mulkey, supra.*

senting from denial of rehearing *en banc* in the instant cases:

> "California is not a neutral bystander in a contest between these private debtors and creditors. The economy of the state has become heavily dependent on the automobile industry in all its parts, an essential feature of which is consumer credit secured by interests in automobiles. California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduces the creditors' costs of repossession, for the evident purpose of stimulating the flow of consumer credit for the benefit of the state's economy, at the expense of those whose automobiles are summarily seized. Thus, the automobile-secured credit industry in California has become a state instrumentality through which California seeks to generate public benefits. Of greater moment in this state action context, however, is that California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasijudicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees." Pet. App. pp. 37-38.

California's comprehensive pattern of regulation delegates specific governmental functions to secured creditors in furtherance of the previously identified state

interests. The statutory scheme effectively confers the essentials of both judicial and police power on the secured creditor. He is expressly empowered to act as an arbiter of disputes and seize goods as if in the execution of a judgment. When the state abdicates these roles to so-called private persons, in the interest of economy, these functions still retain all of the characteristics of an act of the state. *Evans v. Newton,* 382 U.S. 296, 299 (1966); *cf., United States v. Williams,* 341 U.S. 97 (1950); *United States v. Price,* 383 U.S. 787 (1965); *United States v. Guest,* 383 U.S. 745 (1965).[21]

The foregoing analysis demonstrates that significant state interests have been implemented through a pervasive statutory framework delegating state power to private individuals. Their resultant conduct has the force of law and is subject to constitutional scrutiny.[22]

Had the court below reached the due process issue, the fate of California's repossession statutes would be sealed. None of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company,* .... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974) are

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[21]The relationship between the repossession statutes and the function delegated thereby was analyzed by Judge Hufstedler:

> "The more pervasive is the regulation, the more likely is the regulated enterprise performing a function of the state. Demonstration of governmental interest, rather than the particular nature or history of the specific activity, is the public function indicium." Pet. App. p. 36 (footnotes omitted).

[22]The court of appeals' suggestion that non-race cases are subjected to a stricter state action test (Pet. App. pp. 16-18) is not supported by the decisions of this Court. *See Public Utilities Comm'n v. Pollack, supra; United States v. Williams, supra; Railway Employes' Dept. v. Hanson,* 351 U.S. 225 (1956); *Lathrop v. Donahue,* 367 U.S. 830 (1961); and *Marsh v. Alabama, supra.*

required by the challenged provisions. The Louisiana sequestration procedures upheld in *Mitchell* specifically required:

1. That the creditor institute a possessory action against the debtor with an opportunity for hearing before final resolution of the dispute. 42 U.S.L.W. at 4672.

2. That a writ of sequestration would issue only on a clear showing of narrowly confined facts, *i.e.*, the debt, lien, and delinquency. 42 U.S.L.W. at 4674.

3. That this showing be made by affidavit or verified petition. 42 U.S.L.W. at 4673.

4. That this showing be made before a judge. *Id.*

5. That a writ would issue only after the filing of a sufficient bond to protect the debtor against improvident issuance of a writ. *Id.*

6. That the debtor be afforded an opportunity for an immediate hearing by means of a motion to dissolve the writ. The creditor retained the burden of proof, and if the debtor was successful, damages and attorney's fees could be awarded. *Id.*

7. That the debtor be afforded the opportunity to immediately regain possession by filing his own bond. *Id.*

By comparison, the California statutes abrogate our most basic conceptions of due process. Midnight raids on debtors' property substitute for the rule of law.

Conclusion.

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

George T. Adams, Plaintiff-Appellee, vs. Southern California First National Bank, Defendant-Appellant. No. 72-1484.

Willie O. Hampton & Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, vs. The Bank of California, National Association, a California banking corporation, Defendant-Appellee, No. 72-1888.

[October 4, 1973].

Appeals from the United States District Courts for the Southern and Northern Districts of California.

Before: CHAMBERS and TRASK, Circuit Judges, and BYRNE,* District Judge.

TRASK, Circuit Judge:

These two cases present appeals from contrary results reached by two district courts on the question of the constitutional due process rights of debtors whose property is repossessed by self-help, without formal legal proceedings.

The *Adams* case is before this court on an interlocutory appeal by the Southern California First National Bank (S.Cal. Bank) from an order of the Dis-

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*Honorable William M. Byrne, Sr., United States District Judge for the Central District of California, sitting by designation.

trict Court of the Southern District of California granting Adams' motion for partial summary judgment.[1]

The trial court concluded first that the enactment of sections 9503 and 9504[2] of the California Commercial Code set forth a state policy constituting sufficient state action "to raise a federal question" under the provisions of the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3). From that position it concluded that the repossessions denied the plaintiffs their constitutional rights and that sections 9503 and 9504 "which provide for such tak-

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[1]In the District Court, the *Adams* case was consolidated with *Posadas v. Star & Crescent Federal Credit Union* upon a stipulation to decide the single issue of declaratory relief. Both Adams and Posadas filed a motion for partial summary judgment which was granted by the trial court, and it is from that order that this appeal arises. The controlling question of law certified by the trial court is one affecting both cases, and although the record is unclear, this appeal would appear to affect and control the disposition of both *Adams* and *Posadas*. The trial court's opinion is reported at 338 F. Supp. 614 (S.D. Cal. 1972).

[2]Section 9503 provides in pertinent part,

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504."

Section 9504 provides in pertinent part,

"(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .

* * *

"(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . ."

ings" are constitutionally invalid.[3] This court has jurisdiction under 28 U.S.C. § 1292(b), the trial judge having certified that his order involves a controlling question of law, and a panel of this court having granted leave to appeal.

The controlling questions of law are whether the repossession of motor vehicles by self-help on default of a payment contract which provides for such repossession, is an act under color of state law, and thus gives rise to a claim under 42 U.S.C. § 1983, in view of the provisions of sections 9503 and 9504 of the California Commercial Code and is thus state action within the meaning of the Fourteenth Amendment; and whether such sections are unconstitutional as state action which authorizes summary repossession without affording due process.

The *Hampton* case involves an appeal from an order of the District Court for the Northern District of California dismissing appellant's complaint challenging the prejudgment summary repossession procedure for lack of jurisdiction over the subject matter. The appeal from the decision in the consolidated cases from the Southern District was joined with the appeal from the decision of the Northern District in this court.

Plaintiff-appellee Adams had been a continuous resident of California for nearly 48 years, and of San Diego for nearly eight years prior to the initiation of this action. While residing in San Diego, Adams had maintained a good credit record. In need of money for medical bills, on June 17, 1968, Adams borrowed $1,000 from the Bank of La Jolla (predecessor in interest to the S.Cal. Bank). In return for the loan,

[3] 338 F. Supp. at 618.

Adams executed a promissory note to repay $48.44 per month, for a total of $1,160.16, and a security agreement giving the bank a security interest in three vehicles—a 1961 VW sedan, a 1960 VW sedan, and a 1959 VW van. The security agreement contained the following language:

> "Should Debtor fail to make payment of any part of the principal or interest, as provided in said promissory note . . . the whole principal sum unpaid upon said promissory note with interest accrued thereon, . . . shall immediately become due and payable at the option of the Secured Party. Upon the occurrence of any such event of default Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or any other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicles. . . ."

Between July, 1968 and October, 1970, Adams experienced three job changes and intermittent unemployment. By January 22, 1970, Adams had repayed nearly $900 of the loan. On this date he became unemployed, and a further payment was not made on his loan until July 7. Between July 25 and August 17, 1970, Adams and representatives of the S.Cal. Bank discussed the status of his loan, which at that point in time had an outstanding balance of $217.45.

On August 17, 1970, the decision was made by the S.Cal. Bank to take possession of the vehicles covered by the security agreement, and at some time between 5:00 p.m. on August 19 and 7:00 a.m. on August 20, Richard Egley, a repossessor licensed by the State of California, took the 1959 van and the 1960 sedan from Adams' possession.[4]

After deducting costs of repossession and storage of the vehicles from the proceeds of a private sale, the net recovery amounted to $219.15. This amount when applied against the balance due resulted in a deficiency of less than $1.00 which was cancelled.

On October 23, 1970, Adams filed suit in district court against the S.Cal. Bank and Richard Egley for damages and declaratory relief. The case was delayed pending decision by the Supreme Court of *Fuentes v. Shevin*, 407 U.S. 67 (1972). After that decision and following oral argument, Adams' motion for partial summary judgment for the declaratory relief sought was granted.

Plaintiff-appellant Hampton purchased a 1967 Buick on September 3, 1969. The purchase was financed by means of a contract of sale which was assigned to The Bank of California (Bank), and which called for 30 monthly payments of $118.30,or a total of $3,549. After nearly two years of making payments, Hampton was allegedly late in making his August, 1971 payment. Hampton claims that the Bank agreed that he could

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[4]At the time of the summary seizure, the two vehicles contained various items of personal property not covered by the security agreement. Adams made unsuccessful attempts to recover this property by contacting both the Southern California Bank and Egley on two different occasions. He finally regained these items some six weeks later.

make up the missed payment at a later date, so long as he kept current on the rest of his payments, and in accordance with this agreement, Hampton tendered the next month's payment. This payment was returned to him, and sometime during the night of October 14, 1971, the Bank repossessed the car. In a letter dated October 4, the Bank noticed their intent to sell the vehicle unless Hampton paid the contract balance plus collection charges, a total of $946.89.

Hampton then commenced this lawsuit as a class action, challenging the constitutionality of summary prejudgment repossession without due process requirements of notice and opportunity for a hearing. The district judge enjoined the private sale pending a hearing on an order to show cause. Following settlement of the dispute between the Bank and Hampton, the trial judge for the Northern District of California on his own motion dismissed the case for lack of subject matter jurisdiction, finding that the state action required for jurisdiction in the federal courts under 28 U.S.C. § 1343(3) was lacking. An appeal was taken which has been consolidated with the appeal in the Adams case.

The issue on these appeals is whether prejudgment self-help repossession of secured property, as provided for in the security agreements between the creditors and the debtors and as authorized under sections 9503 and 9504 of the California Commercial Code involves sufficient state action to establish a federal cause of action.[5] Adams and Hampton invoke the jurisdiction

[5]It is important to emphasize that what is challenged here is not self-help repossession as a remedy, but rather the procedure of using self-help without giving notice or providing the opportunity for a hearing prior to the seizure.

of the federal courts pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3),[6] claiming that the summary repossession procedures constitute action taken "under color of state law" within the meaning of the Fourteenth Amendment.[7] If the repossession was not state action but only an individual invasion of individual rights, then the remedy is not the subject of the Fourteenth Amendment. *Civil Rights Cases,* 109 U.S. 3, 11 (1883). Adams also asserts federal question jurisdiction under 28 U.S.C. § 1331.

Both Adams and Hampton allege that California authorizes, regulates and participates in self-help repossessions by means of a pervasive statutory scheme which sets forth, *inter alia,* the basic right to repossess summarily; several terms which must appear in retail

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[6]42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343(3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

[7]Section 1 of the Fourteenth Amendment provides;

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

installment contracts; the procedures to be followed during and after repossessions; licensing requirements for a person in the business of repossessing; and provisions that clear title to the repossessed vehicle and permit the creditor to obtain a deficiency judgment.[8] Both allege that the Code provisions embrace a state policy encouraging self-help repossession, and conclude that by sanctioning self-help repossession in statutory form, California has "significantly" involved itself in the repossession process. Additionally, both debtors contend that Code § 9503 vests in the secured party a function normally performed by the State, and that § 9504 and California Civil Code § 2983.2, permitting the creditor to sue for a deficiency judgment, amount to judicial enforcement of procedures by which due process rights have been denied.

In addition to these arguments, appellee Adams submits that the express assertion by the S.Cal. Bank in the security agreement of its reliance on the remedies provided in the California Commercial Code clothe the creditor with the authority of state law. Adams also argues that the ultimate source of the right to repossess and resell collateral is the Code and not the security agreement.

We find that the State of California is not so significantly involved in the self-help repossession procedures undertaken by the creditors in these cases to

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[8]Relevant California statutory provisions are: (a) for the right to repossess, Civil Code § 2983.3; (b) for provisions required in retail motor vehicle conditional sales contracts, Civil Code § 2982; (c) for the right to sell the repossessed vehicle and the requirement of giving notice before resale, Civil Code § 2983.2; (d) for licensing of repossessors, Business and Professions Code §§ 7520, 7521; (e) for clearing title to the repossessed vehicle, Vehicle Code §§ 5600, 5601, 5602, and 9561.

permit this court to find the state action or conduct taken under color of state law required to establish a federal cause of action.

The under color of law requirement of § 1983 has been treated as the equivalent of the state action requirements of the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794-95 n.7 (1966); *Green v. Dumke*, No. 71-1260 (9th Cir., June 18, 1973) (slip opinion at 4); *but cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 188 *passim* (1970) (Brennan, J., concurring and dissenting). Under these concepts, the Supreme Court has frequently held that action taken by what would otherwise be considered to be private individuals or organizations is within the state action definition.[9] In the present cases we have action in the nature of summary seizure of personal property, taken by private creditors or their representatives, without having requested state help and without any direct action or review by state officials.[10] The Supreme Court has stated recently that:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must

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[9]*See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966); *Robinson v. Florida*, 378 U.S. 153 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *But cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); and *Evans v. Abney*, 396 U.S. 435 (1970).

[10]This factor is what distinguishes these cases from *Fuentes v. Shevin*, 407 U.S. 67 (1972), because there in enforcing the creditor's writ of replevin, issued summarily by a court clerk, a state officer seized the repossessed goods. Some of the evils are

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> have 'significantly involved itself . . .' to fall within the ambit of the constitutional prohibition." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (citation omitted).

Although it is not perfectly clear that the same state action test used by the Court in equal protection cases applies to due process cases, we must consider California's involvement in self-help repossessions undertaken by creditors located in California with the "significantly involved" concept in mind.

We begin our consideration of California's involvement in self-help repossession by referring to the admonition of the Supreme Court that:

> "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[the Supreme Court] has never attempted.' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (citation omitted).

One essential element for taking action under color of law is that the person act "with knowledge of and pursuant to" a State law, statute, etc. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970). The debtors point to the security agreement, the terms of which conform with Code §§ 9503 and 9504, and

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still present—no state official participates in the decision to repossess, nor does one evaluate the need for immediate seizure, nor does one review the basis for the claim to repossession—but because control over state power has not been abdicated, the State here does not act in the dark. *Cf. Fuentes, supra*, 407 U.S. at 93.

which refers to and incorporates the rights and remedies of a secured party under the Code, as evidence that the creditors acted with knowledge of and pursuant to a state statute. The debtors also note the reference in the security agreement to "any other applicable law," and the reliance by the creditors on their legal right to repossess as action taken with knowledge of and pursuant to state law. Finally, they contend that California, by the several statutory sections cited earlier, has legislated binding contract terms and conditions, and that the Commercial Code sections in particular have replaced the common law or contractual basis for these remedies. On the other hand, the creditors claim that it was the contract provision upon which the creditors relied for their authority to repossess.

Prior to the enactment of the California Commercial Code sections in issue, parties to a secured transaction could provide by contract for the remedy of self-help repossession;[11] indeed, this remedy has been recognized and permitted as a part of the common law.[12] However, we do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.*, that a secured party upon default had a right to take

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[11]California did not enact the Uniform Conditional Sales Act and the courts in this area were dependent upon case law and terms of the agreement. Upon the buyer's default, the seller could repossess under the terms of the contract, or if this right was not expressly given, it could have been implied. *See, e.g., Johnson v. Kaeser,* 196 Cal. 686, 694-95 (1925); *Miller v. Steen,* 34 Cal. 138, 144 (1867); *Hines, Rights and Remedies Under California Conditional Sales,* 23 Cal. L. Rev. 557 (1935).

[12]Gilmore, Security Interests in Personal Property § 44.1, at 1212 (1965); Uniform Conditional Sales Act § 16, comment; 2 F. Pollack & F. Maitland, History of English Law, at 574-77 (2d ed. 1899).

possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England[13] would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983. Moreover, the very fact that section 9503 gives the alternative of private repossession would appear to contradict the argument that all action under the statute must necessarily be "state" action.

The objective finding that the creditors in part acted with knowledge of and pursuant to state law is but one element of the action taken under color of state law requirement; alone it is not sufficient. The test is not state involvement, but rather is significant state involvement.[14] Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.[15] Further inquiry needs

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[13]"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." California Civil Code § 22.2 (West 1954).

[14]*Moose Lodge v. Irvis*, 407 U.S. 163, 173 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

[15]This extremely broad test appears to have been rejected even in the racial area in *Evans v. Abney*, 396 U.S. 435 (1970), where state law on will interpretation, although effectively excluding Negroes from what had been a public park, was found not to violate the Fourteenth Amendment. *See also Colvin v. Avco Financial Services, Inc.*, 12 U.C.C. Rptr. 25, 26-27 (D. Utah 1973); *Kirksey v. Thelig*, 351 F. Supp. 727, 732 (D. Colo. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972). If we were to accept the debtors' broad test, it would be very difficult to draw any line between state and private action. Indeed, the creditors point out this difficulty when they argue

to be made into the relationship between creditors and the State to see whether the State is significantly involved or entangled in the challenged repossessions, or whether mutual benefits are conferred which would lead to a finding of a "symbiotic relationship" between creditors and the State that was present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), but was absent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).[16]

The legal framework for self-help repossession is found in part 5 of article 9 of the Code. Generally, § 9503 provides that the secured party's right to possession of the collateral accrues on default, unless otherwise agreed, and it allows the secured party to take possession with or without the issuance of judicial process. The Code itself does not require any notice to the debtor prior to the taking of possession.[17] Section 9504 sets forth the right of the secured party to dispose of the collateral at a commercially reasonable public or private sale, and if the secured party fails to comply with statutory rules the debtor is authorized to pursue various remedies. In addition, provision is made for the debtor's right to surplus and liability for deficiency.

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that if any action in conformance with a state law were state action for purposes of the statute (§ 1983) or the constitutional amendment, then the action of the debtors in withholding payments without affording the creditors due process is state action. *See* Code § 2-717.

[16]Or as some courts have stated the formulation, the state must be directly or actively involved, rather than lend mere passive support. *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 654-56 (7th Cir. 1972); *Greene v. First National Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972).

[17]*Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*, 7 U.C.C. Rptr. 952 (Tex. Civ. App. 1970).

The debtors contend that the involvement of the state is reflected by the enactment of §§ 9503 and 9504 of the Commercial Code, which put into statutory form the right of creditors to repossess without judicial process, restrict the procedures to be used on default, and authorize a deficiency judgment.[18] They also state that the Rees-Levering Act[19] regulates all aspects of

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[18]Commercial Code § 9501(3) provides that certain rights and duties may not be waived or varied. In addition, the comment to § 9101 states:

"Except for procedure on default, freedom of contract prevails between the immediate parties to the secured transaction."

[19]The relevant portions of the Rees-Levering Act (California Civil Code §§ 2982 *et seq.*) are:

"§ 2982. Formalities of conditional sales contracts.

"(a) Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and, if printed, shall be printed in type no smaller than six point, and shall contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness. The conditional sale contract or a purchase order shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and an exact copy thereof shall be furnished the buyer by the seller at the time the buyer and the seller have signed the contract or purchase order. No motor vehicle shall be delivered under this chapter until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order and any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign, and which he has signed, during the contract negotiations. The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed. Every conditional sale contract shall contain, although not necessarily in the sequence or order set forth below, the following separate items:

* * *

"10. A notice, in at least eight-point bold type if the contract is printed, reading as follows: 'Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are en-

motor vehicle sales pursuant to retail installment contracts,[20] that repossessors are required to be licensed,[21] and that California clears the title to repossessed vehicles for the creditors. These state laws, they continue, set out a clear policy, authorizing and encouraging the use of self-help remedies which significantly involves California in the challenged activity.

The principal case upon which the debtors rely for legal support is *Reitman v. Mulkey*, 387 U.S. 369 (1967). The California legislature had, during the period 1959-1963, enacted several statutes regulating racial discrimination in housing. In 1964, pursuant to an initiative and referendum, art. I, § 26 (Proposition 14) was added to the state constitution to provide that the State could not place any limitation on the right of a person to deal with his own real property. The historical basis of the challenged constitutional provision led the California Supreme Court to hold that the intent of art I, § 26 was to authorize private racial discrim-

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titled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.'"

[20]If the broad test for state action proposed by the debtors were accepted, it would appear that any and every sales transaction that complied with the Rees-Levering Act would be state action. *Cf. Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972). It appears both illogical and strained to suppose that the framers of the Fourteenth Amendment would have included all private sales paid for in installments under the state action concept.

[21]The argument that the licensing of the repossessors could amount to significant state involvement in the repossession is probably foreclosed by *Moose Lodge*. See the dissent of justice Douglas, 407 U.S. at 180.

ination in the housing market, to repeal the Unruh and Rumford Acts (which regulated racial discrimination in housing), and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. The Supreme Court agreed that art I, § 26 significantly encouraged and involved the State in private discrimination. It held the California constitutional amendment to be violative of the United States Constitution. *Reitman, supra,* 387 U.S. at 381.

The present cases present at least two distinguishing features. First, the State in *Reitman* was involved to a far greater degree in the challenged conduct, because the proposition approved there had been initiated for the purpose of authorizing what had before been expressly prohibited, and if enacted would raise a barrier to the realization of a constitutional goal. This finding was made by the California Supreme Court, and on appeal the Supreme Court found no persuasive considerations upon which to overturn the judgment of the California court. In these self-help cases, the enactment of the provisions of the Uniform Commercial Code did not reverse the law as it had been prior to the enactment of the Code, but merely codified existing law for the most part. This is particularly true for the creditor's remedy of self-help repossession.

Second, and consistent with the reasoning of several other courts,[22] we are not convinced that the resolu-

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[22]*Colvin v. Avco Financial Services, Inc.,* 12 U.C.C. Rptr. 25 (D. Utah 1973); *Kirksey v. Thelig,* 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock National Bank,* 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First National Exchange Bank,* 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America,* 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick v. First National Bank,* 322 F. Supp. 604 (S.D. Fla. 1971); *Brown v. United States National Bank,* 12 U.C.C. Rptr. 549 (Ore. 1973); *Mes-*

tion of the state action question involving prejudgment self-help repossession of secured property is controlled by a case involving racial discrimination.[23] Unlike *Reitman*, there has been no finding that it was the intent of the State in passing § 9503 to authorize any conduct that would violate the Fourteenth Amendment. And unlike racial discrimination cases in general, which have evidenced a pattern of intentional indirect circumvention of constitutional rights,[24] these creditor remedies were based on economically reasoned grounds of very long standing, which appear to have been

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senger v. Sandy Motors, 121 N.J. Super 1, 295 A.2d 402 (1972); *contra, James v. Pinnix*, ... F. Supp. ..... (S.D. Miss. 1973); *Michel v. Rex Noreco, Inc.*, 12 U.C.C. Rptr. 543 (D. Vt. 1972).

[23]Although it may be argued that state action is a "jurisdictional" question to be considered separate from substantive matters, the test of balancing facts and weighing circumstances seems to require consideration of the substantive facts. This should not result in a hierarchy of rights, or different state action tests for due process and equal protection, but rather should permit independent factual determinations of state action on a case-by-case approach.

[24]*See Grafton v. Brooklyn Law School*, No. 73-1098 (2d Cir., May 24, 1973), where Chief Judge Friendly also suggested that (a) the fact that the challenged regulations required only what the law schools had been doing for years and, acting through their own professional organizations, had decided they should do, distinguished the challenged written examination requirements from state action found when disciplinary actions were taken under "symbolic" regulations for maintenance of public order in *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970), and (b) while an

> "index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to confront other constitutional rights." Slip opinion at 3757.

Thus, merely enacting into statutory form what had been the accepted practice for years, and a limited involvement that may be sufficient for racial cases, does not command a finding of "state action" in an economic due process case.

the topic of extensive research and legislative investigation.[25]

We consider *Reitman* quite relevant for what the Supreme Court stated that case did not hold:

> "[the California court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations." 387 U.S. at 376.

In addition to the practical consideration that a great deal of human behavior conforms to state law, we find the last portion of the quoted language nearly controlling as authority on which to reject the debtors' allegations that by merely putting into statutory form existing private remedies, the State conclusively and significantly involves itself in the private conduct.

Nor do we find anything approaching the symbiotic relationship between the lessor and lessee that was present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 174-75. The creditors in these cases were not located on land owned by any public

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[25]*See Fuentes v. Shevin*, 407 U.S. 67, 103 (White, J., dissenting); *R. Johnson, Denial of Self-Help Repossession: An Economic Analysis*, found in the Appendix to the Amicus Brief of the Permanent Editorial Board for the U.C.C., and filed separately with the Amici Briefs of Ford Motor Credit Co., General Motors Acceptance Corp., Chrysler Credit Corp., and C.I.T. Financial Services, Inc.

authority, and were not part of a large, continuing public enterprise.[26] It has not been shown how the State or any of its agencies has been benefited as was the parking authority in *Burton*, nor has it been shown how any significant benefit has been conferred on the creditors by the enactment of § 9503.[27] It is arguable that the State has made it more difficult for a debtor to opt out of the self-help remedy now that it has been put in statutory form,[28] but the creditors had the remedy prior to the legislation, and repeal of § 9503 would still leave the parties free to provide in the security agreement for the self-help remedy. The State cannot be held responsible for creating the conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property.[29]

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[26]*Cf. Male v. Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972) (Urban Renewal Agency presented privately owned apartment complex with a fully prepared building site; held, symbiotic relationship).

[27]*Cf. Doe v. Bellin Memorial Hospital*, No. 73-1396 (7th Cir., June 1, 1973) (no state action, because government did not regulate the particular activity challenged, the State was not the beneficiary of the hospital's rules, and the hospital obtained no benefits from the State as a result of following the challenged procedures on abortion).

[28]*See Kirksey v. Thelig*, 351 F. Supp. 727, 731 n.8 (D. Colo. 1972); *Neth, Repossession of Consumer Goods; Due Process for the Consumer: What's Due for the Creditor*, 24 Case W. Res. L. Rev. 7, 56 (1972).

[29]Summary repossession without notice or an opportunity for a hearing may in some instances be unconscionable, or void as a matter of public policy. *See Ford Motor Credit Co. v. Waters*, 12 U.C.C. Rptr. 18 (Fla. Dist. Ct. App. 1973); *Fontaine v. Industrial National Bank*, 298 A.2d 521 (R.T. 1973) [11 U.C.C. Rptr. 1096]. Both cases held wrongful, summary repossession where the creditor had previously accepted late payments after default. *Cf. D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187-88 (1972).

Another basis upon which the debtors urge that state action may be found is the extensive system of state regulations. In *Robinson v. Florida,* 378 U.S. 153 (1964), state health regulations required separate toilet facilities for whites and blacks. There was nothing that directly forbade restaurants from serving both races. The Supreme Court found that the regulations placed burdens upon restaurants serving both races and concluded:

> "[T]hat the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment." 378 U.S. at 156-57.

In *Moose Lodge, supra,* the trial court directed attention to the many ways in which the Pennsylvania Liquor Control Board exerted its regulatory will over private clubs as proof of the pervasive nature of state action there. 407 U.S. at 176-77. But the Court pointed out that none of the regulations had significance on the issue for decision, that is, the establishing or enforcing of discriminatory guest policies. Here, appellees point to a comprehensive system for sale of collateral, notice of sale, and application of payments. None of these requirements addresses itself to the issue of when and whether private repossession will be used or whether formal court action will be preferred. There is no "pervasive" state action directed to self-help repossession to require its use. It is simply named as one of two already existing alternatives.

A similar issue has been involved in non-racial cases involving utility service termination procedures of pri-

vately owned utility companies. *Palmer v. Columbia Gas, Inc.*, No. 72-1772 (6th Cir., May 22, 1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); *Bronson v. Consolidated Edison*, 350 F. Supp. 443 (S.D.N.Y. 1972); *Hattel v. Public Service Co.*, 350 F. Supp. 240 (D. Colo. 1972); *Stanford v. Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972). *Contra, Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972); *Jackson v. Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D. Pa. 1972). In *Palmer*, an Ohio statute authorized the utility to enter the premises of a customer who allegedly had not paid his bill, to disconnect service and remove equipment. Stressing the monopolistic character of the company, and the necessity of the service it provided, the Sixth Circuit found state action because virtually every aspect of the company's operations were subject to regulation by the state or city, because the state had granted to utilities powers not usually possessed by private corporations (authorized entry to private property; eminent domain), and because the company was undertaking a legitimate public function by providing gas service.

The *Lucas* case involved a similar fact situation, but there the Seventh Circuit found that the authority given to the utility by the State to enter private property had not been invoked by the defendants. The activity challenged by the plaintiffs in *Lucas* was termination of service, and the utility could accomplish this by simply throwing the proper switch, or disconnecting wires; thus, the Court found no action taken under color of state law by the utility.

For our cases, the utility termination cases are relevant because they deal with state action in a non-racial

area. We agree with the standard that the support by the State of private conduct must be significant to come within § 1983, and that, as stated by the Seventh Circuit:

> "affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy . . . ." *Lucas, supra,* 466 F.2d at 656.

And, we can distinguish the creditor's actions in our cases from the utility in *Palmer* on the basis of the greater extent to which the State has reserved power to control and regulate the operations of a public utility, and the greater amount of power given to the utility which is usually reserved to the State. *See Palmer, supra,* slip opinion at 15.[30]

The debtors contend that, although private in form, the substance of the action of the creditors was to perform a function or service that would otherwise in all likelihood be performed by the State, and thus is distinguishable from the facts in *Moose Lodge.* The debtors rely on the "public function" cases decided by the Supreme Court,[31] and particularly on the approach tak-

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[30]Other cases that have stressed the continuous nature of the public enterprise or the continuity of regulation are: *Male v. Crossroads Associates,* 469 F.2d 616 (2d Cir. 1972); *Smith v. Holiday Inns, Inc.,* 336 F.2d 630 (6th Cir. 1964); *McClellan v. University Heights, Inc.,* 338 F. Supp. 374 (D.R.I. 1972); *McQueen v. Druker,* 317 F. Supp. 1122 (D. Mass. 1970), *affirmed in part,* 438 F.2d 781 (1st Cir. 1971); *cf. Weigand v. Afton View Apartments,* 473 F.2d 545 (8th Cir. 1973).

[31]The "public function" cases relied on by the debtors have held that activity undertaken by apparently private individuals or organizations may be characterized as the performance of a state or public function. Among others, they cite *Smith v. Allwright,* 321 U.S. 649 (1944) (state law extensively regulated Texas primaries, held that the Democratic Party was an agent of

en by the Fifth Circuit in *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).[32] There, the Fifth Circuit dis-

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the State because the selection of party nominees was delegated to a private political party, thus exclusion of Negroes from voting in primaries was a Fourteenth Amendment violation); and *Terry v. Adams*, 345 U.S. 461 (1953) (Texas county political group excluded Negroes from preprimary elections, which were not regulated by the State; however, because the winners of these elections nearly always ran unopposed in later elections, state action was found, either because the state permitted the only effective election or because the private group performed a state function). Among other distinguishing features, both of these cases may be limited to racial discrimination in voting, a practice specifically prohibited by the Fifteenth Amendment.

Another case cited by the debtors is *Evans v. Newton*, 382 U.S. 296 (1966). Public officials, pursuant to privately created trust, had managed a park; private trustees were appointed, but the Court held that the park remained a public facility, and that the private trustees were performing the same public function of park management—the park was still entangled with the state. Under the terms of the will, however, the Georgia state court subsequently applied the cy pres doctrine and held that the property reverted to the testator's heirs because to permit Negroes to use the park would frustrate the intent of the testator. The Supreme Court found no discriminatory state action in giving effect to state law. *Evans v. Abney*, 396 U.S. 435 (1970).

In *Abney*, the courts were not called upon to enforce racial discrimination, but instead were called upon to recognize the privately created rights in the deed of trust, even though it contained a racial restriction apparently authorized by a state statute (which arguably had changed the common law). The *Abney* distinction between court enforcement of privately created rights and giving legal effect to those rights can be analogized to the facts here, where the creditor is not asking the court to enforce his right to possession, but rather is defending on the basis that the courts should recognize the legal effect of the provision for self-help repossession in the Code and in the security agreement. *See* Neth, *supra*, n.28 at 60; *Messenger v. Sandy Motors*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

[32]Using a similar approach are *Magro v. Lentini Brothers Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971); and *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (Judge Levin also speaks to the issue of jurisdiction under § 1331.) *See also B. Clark & J. Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355, 377 (1973)

Subsequent history of *Hall* appears at 468 F.2d 845 (5th Cir. 1972).

cussed state action in the context of whether appellant, a tenant who had her television set seized by a landlord under the authority of a Texas statute (which gave the landlord a lien on personal goods of the tenant, and authority to enforce that lien by peremptory seizure of the property), had stated a claim for which relief could be granted under 42 U.S.C. § 1983. That circuit held:

> "In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer of the state or an official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State." 430 F.2d at 439.

Hall is distinguishable because the state of Texas was significantly involved in the private landlord's conduct. The property seized in that case belonged to the tenant, and the action of the landlord was taken pursuant to a Texas statute which vested authority in the landlord that was normally exercised by the State and had historically been a function of the State of Texas. The landlord clearly had invoked state procedures in order to seize the tenant's property. *Cf. Joy v. Daniels*, No. 72-2479 (4th Cir., June 11, 1973). In these self-help cases, the creditor was seizing property that had been entirely his and that, practically and according to the terms of the contract, the debtor had not yet paid for. Further, a strong case can be made that it is a tradition that repossession is not a state function, and that the creditor was invoking a private remedy rather than a state power which had been delegated to him.

Legal researchers point out that English law in the thirteenth century rigorously prohibited self-help, that it "at a fairly early stage . . . begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment."[33] Historians appear to differ over just when the law began to ease with respect to allowing self-help.[34] Based on this history, it does not appear likely that the Fourteenth Amendment, when written, was intended to eliminate summary self-help in light of the prevailing use of peaceful repossession.[35]

The debtors attack § 9504 on the grounds that the procedures set forth in that section supplement the self-help right and so should be considered as part of the challenged conduct, and that the deficiency judgment action authorized by § 9504 represents a statutorily created right not allowed creditors at common law, and results in judicial enforcement of procedures whereby due process has been denied, thus coming under *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953).

The creditors respond that § 9504 was not held unconstitutional by the district court's opinion, and therefore is not in issue on this appeal. Although the opinion of the lower court does explicitly state that § 9504 procedures are unconstitutional, the creditors contend that the opinion specifically limited the issue

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[33]2 F. Pollock & F. Maitland, *The History of English Law* 574 (2d ed. 1899).

[34]*See* Pollock, n.33, *supra*.

[35]*Accord, Pease v. Havelock National Bank*, 351 F. Supp. 118, 122 (D.Neb. 1972). It may also be argued that no debtor would reasonably think that in repossessing the unpaid-for vehicle, the creditor was acting as an arm of the state. *Cf. Grafton v. Brooklyn Law School*, No. 73-1098 (2d Cir., May 24, 1973) (Slip opinion at 3760).

there to repossession procedure, and did not discuss any constitutional defect of the Code provision for permitting a deficiency judgment action to secured parties.

One major difference between enforcement of a deficiency claim and enforcement of racially restrictive covenants is that the deficiency claim is based on the underlying debt, and thus arguably not related to the alleged unconstitutional seizure. Another is that the restrictive covenant cases may be and apparently have been limited to situations where the judicial enforcement had the effect of forcing an unwilling party to discriminate. Furthermore, *Shelley* involved what would effectively amount to a zoning practice, traditionally a state activity.

Finally, we note cases which have held that state enforcement procedures, applied neutrally, will not alone rise to the level of state action absent a showing that a state in applying its law is privy to a private party's discriminatory purpose, *see Griffin v. Maryland*, 378 U.S. 130 (1964) (state arrest and prosecution of blacks for using a privately owned amusement park open to the public); *Weigand v. Afton View Apartments*, 473 F.2d 545, 548 (8th Cir. 1973); *Lavoie v. Bigwood*, 457 F.2d 7, 11 (1st Cir. 1972), or that some significant state power has been delegated to the private organization or individual. *Joy v. Daniels*, No. 72-2479 (4th Cir., June 11, 1973) (mortgage benefits and rent supplements received from FHA, authorization from the County Council, and state approval of federal participation when combined with use of state eviction procedures led to a finding of state action); *Lavoie v. Bigwood, supra* (confluence of court-ordered eviction and monopoly power created by zoning led to

finding state action in eviction of mobile home park tenant).

Adams contends that the Code provisions clothe secured parties with the authority of state law, relying on *United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966); and *Williams v. United States*, 341 U.S. 97 (1951). The first two cases involve action taken directly and clearly in concert with state officials in an indirect attempt to avoid discrimination prohibitions. The *Williams* case was concerned with a private detective who held a special police officer's card issued by the city of Miami, Florida, had taken an oath and qualified as a special police officer, and was employed by a business corporation to uncover the identities of thieves who had been stealing their property. Using brutal methods, the detective, often accompanied by a police officer and flashing a badge, obtained confessions from several suspects. That fact situation amply describes what is meant by being clothed with the authority of state law. The creditors in the present cases have not been endowed with anything comparable to the authority given the detective in *Williams*, nor were they working in active concert with state officials as were the defendants in *Price* and in *Guest*.

A final word about *Fuentes v. Shevin*, 407 U.S. 67 (1972), which seems to constitute both warp and woof of appellee's contentions. On the face of it the Court was there dealing with a state statute under which an action had been filed in court, a writ formally issued, and service of the writ by a state agent. No question about state action. We do not read *Fuentes* so broadly that it encompasses all private actions be-

tween individuals pursuant to their consensual undertakings. The plurality, speaking for the Court, recognize that at common law in addition to formal state action, a creditor could proceed by self-help. 407 U.S. 67, 79 n.12. The minority appears to read the Court's opinion as one clearly distinguishing between the state action rule of *Fuentes* and private repossession.

> "It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all." 407 U.S. at 102.

We reverse in *Adams* and affirm in *Hampton,* noting that the proper ground for dismissing in *Hampton* was failure to state a federal cause of action, rather than that the federal court lacked subject-matter jurisdiction. *Bell v. Hood,* 327 U.S. 678, 681-83 (1946). BYRNE (dissenting)

Both Adams and Hampton sought relief under 42 U.S.C. § 1983 on the grounds that the creditor banks acted "under color of law" and deprived them of "due process of law" by repossessing their automobiles pursuant to Cal. Comm. C. § 9503 and selling those vehicles pursuant to Cal. Comm. C. § 9504. The majority opinion holds in favor of the creditor banks on the "under color of law" issue and apparently considered it unnecessary to discuss the "due process of law" issue. It is my view that the debtors should prevail on both issues.

Regarding the "due process of law" issue, even the creditors appear to concede that, if they did act "under color of law," the debtors were deprived of due process

of law because no judicial hearing was conducted prior to the summary self-help procedures utilized.

Undoubtedly, the creditors' apparent concession on the "due process of law" issue is compelled by the recent case of *Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972) where the Supreme Court stated:

> "The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard ony the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' *Boddie v. Connecticut*, 401 U.S., at 379, including statutory entitlements. See *Bell v. Burson*, 402 U.S., at 539; *Goldberg v. Kelly*, 397 U.S., at 262.
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> "The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See *Sniadach v. Family Finance Corp.*, 395 U.S., at 342 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.

> "Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.' To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possesson and use of the goods."

By its nature, the "under color of law" issue is very conceptual and readily susceptible to purposeful interpretation by both the creditors and the debtors. Admittedly, Judge Trask, writing for the majority, supports his holding on this issue with adequate logic and case authority. He mentions each of the debtors' five arguments in opposition to his holding and he distinguishes the case authority which they offer in support of those arguments. However, in doing so, he seems to *purposefully characterize* §§ 9503 and 9504 as being mere codifications of previously-existing commercial law. Indeed, such a purposeful reasoning process could

likewise justify a contrary holding and thereby protect debtors such as Adams and Hampton from the well-known creditor abuses which often occur when those summary self-help provisions are utilized.

Such a contrary holding can be justified by the debtors' "state encouragement argument" and supported by *Reitman v. Mulkey*, 387 U.S. 369 (1967). Both that argument and that case are discussed in the majority opinion. The majority claims that *Reitman* is distinguishable from the instant two cases for the following two reasons: (1) In *Reitman*, the State of California was involved to "a far greater degree" because it approved Proposition 14 and thereby reversed previously-existing law. In the instant two cases, the legislature enacted §§ 9503 and 9504 in order to codify previously existing law rather than to reverse it; and (2) In *Reitman*, California's "subjective intent" in approving Proposition 14 was to indirectly circumvent individual constitutional rights and to encourage racial discrimination in housing. In the instant two cases, the debtors have failed to show that the State harbored such an insidious "subjective intent."

The majority's asserted distinctions do not render *Reitman* inapplicable to the instant two cases. The first alleged distinction is merely a bare conclusion, i.e., that the State was involved to "a far greater degree" in *Reitman*, is justified by an insignificant factual difference, i.e., §§ 9503 and 9504 merely codified previously-existing law rather than reversing it. The second asserted distinction seems to suggest that the debtors must prove an *un*provable fact, i.e., that California's subjective intent in enacting §§ 9503 and 9504 was to deprive debtors such as Adams and Hampton of due process of law. Such an argument tends to obscure *the*

important fact that the creditor banks relied on those statutory provisions in order to deprive the debtors of their proprietary interests in the automobiles without due process of law.

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The State of California deliberately chose to follow a State policy of encouraging the repossession and sale of collateral without a prior judicial hearing. It embodied such a policy in §§ 9503 and 9504. The creditors admit that they acted pursuant to those sections when they repossessed and sold the collateral. The State meaningfully encouraged the repossessions and sales and thus became significantly involved within the meaning of *Reitman v. Mulkey*, 387 U.S. 369 (1967).

It is clear that the creditors acted under color of State law and it follows that they deprived the debtors of "due process of law" by repossessing their automobiles pursuant to that law.

I would affirm in *Adams* and reverse in *Hampton*.

APPENDIX B.

Order on Suggestion of En Banc Consideration.

United States Court of Appeals for the Ninth Circuit.

George T. Adams, Plaintiff-Appellee, vs. Southern California First National Bank, Defendant-Appellant. No. 72-1484.

Willie O. Hampton & Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, vs. The Bank of California, National Association, a California banking corporation, Defendant-Appellee. No. 72-1888.

[March 12, 1974].

Before: CHAMBERS and TRASK, Circuit Judges, and BYRNE,* District Judge.

A petition for rehearing was denied by a majority of the panel, Judge Byrne dissenting.

Upon request of a member of the Court who was not a member of the panel, proceedings were commenced to obtain a vote of the Court to consider the cases en banc.

The following changes have been made in the opinion: (all references are to the slip opinion)

Seventh line from bottom of the middle paragraph on page 19: Strike "these self-help cases"; substitute "Hampton".

Add footnote 33a at the end of the same sentence as above, as follows:

> "In *Adams* this argument regarding the creditor's ownership of the property cannot be made. As

*Honorable William M. Byrne, Sr., United States District Judge for the Central District of California, sitting by designation.

> stated, *supra,* Adams borrowed money and secured the loan by a note and surety agreement giving the secured party the right to take possession. In *Hampton* the purchase was financed by a purchase contract payable in installments. *Hall,* on its facts, does not present such a distinction. The issue in *Hall* was the legality of a seizure resting solely upon a landlord's lien statute. While the statute in *Hall* provided that nothing therein 'shall prejudice' any contractual agreements between lessor and lessee concerning the subject matter of the statute (430 F.2d at 432 n.1), there was no indication in the case that any such agreement had been made."

All members of the Court in active service have considered a request for en banc consideration. A majority of the Court has rejected the request.

Judge Hufstedler files an opinion dissenting from the rejection of en banc consideration.

Judge Ely did not participate in the consideration or decision of the en banc request. Judge Wallace did not participate in the consideration or decision of the en banc request as to the *Adams* case.

HUFSTEDLER, Circuit Judge, dissenting from denial of hearing en banc:

I cannot agree that California's self-help repossession scheme does not so significantly involve the state as to constitute state action for the purpose of invoking the Fourteenth Amendment. Although each aspect of California's participation, considered alone, might be inadequate to compel a state action conclusion, the combination of its activities draws the state well within

the state action ambit. As *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451 teaches, ostensibly private action is state action if the state both heavily regulates the private activity and specifically approves the very practice challenged under the Fourteenth Amendment.[1] Underlying the principle in *Pollack* is a recognition that enterprises operating within heavily regulated areas of activity are performing functions sub-

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[1]"We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service [on Capital Transit vehicles] to make it necessary for us to consider [whether the radio service violates the First and Fifth] Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. *We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.*" Public Utilities Commission v. Pollak (1952) 343 U.S. 451, 462 (emphasis added; footnote omitted). *Compare* Reitman v. Mulkey (1967) 387 U.S. 369, 379, *with* McCabe v. Atchison, T. & S.F. Ry. (1914) 235 U.S. 151; Linscott v. Millers Falls Co. (1st Cir. 1971) 440 F.2d 14, 16, *with* Railway Employees' Dept. v. Hanson (1956) 351 U.S. 225, 231-32.

The Supreme Court has consistently regarded the statement in *Pollak* as having the force of a holding. (*See, e.g.*, Evans v. Newton (1966) 382 U.S. 296, 301; *cf.* Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163, 175-76 n.3.) Similarly, although *Pollak* addressed the issue of "federal government action," the Court has indicated that *Pollak's* principle is no less applicable in the state action context. (*See* Evans v. Newton, *supra.*) Finally, it is of note that *Pollak* was not a racial discrimination case. (*See* Evans v. Newton, *supra* at 319-20 (Harlan, J., dissenting).) Hence Judge Trask's suggestion, even if otherwise sound, that certain state action principles should be confined to racial discrimination controversies cannot be applied to the rule articulated in *Pollak*.

stantially affecting the public weal. The more pervasive is the regulation, the more likely is the regulated enterprise performing a function of the state.[2] Demonstration of governmental interest, rather than the particular nature[3] or history[4] of the specific activity, is the public function indicium. When the activity not only falls within a regulated area, but also is the subject of a statute or administrative rule that expressly authorizes or mandates that activity by a regulated enterprise, private conduct pursuant to the statute or rule is deemed to be state action, as *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163 implicitly acknowledges. There, the state heavily regulated some aspects of the lodge's activity, but it exercised no regulatory jurisdiction over the lodge's discriminatory membership and guest policies.[5] The Court distinguished *Moose Lodge* from *Pollack* solely on the ground that "[u]nlike the situation in *Public Utilities Comm'n v. Pollack,* 343 U.S. 451 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." (*Moose Lodge No. 107 v. Irvis,* supra at 165-76 n.3.) If the Pennsylvania regulatory agency had authorized the discriminatory policies of the lodge, the state would thereby have assumed regulatory jurisdiction. Having

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[2]*Cf.* Evans v. Newton (1966) 382 U.S. 296, 301-02.

[3]*Cf.* Terry v. Adams (1953) 345 U.S. 461; Marsh v. Alabama (1946) 326 U.S. 501.

[4]*Cf. Evans v. Newton* (1966) 382 U.S. 296.

[5]One of the state's regulations indirectly exerted influence on the lodge's policies. The Court obliterated this indirect effect of the regulation when it held that the regulation, facially neutral, was unconstitutional insofar as it could be applied to enforce the lodge's racially discriminatory policies.

assumed regulatory jurisdiction of such behavior, any acts of the lodge authorized by statute or regulation would have been state action.

When the principles of *Pollack* and *Moose Lodge* are applied to the California self-help repossession scheme, the conclusion of state action is compelled. The automobile-secured credit industry is heavily regulated by the state. (*See, e.g.*, Cal. Civil Code §§ 2981-84.4; Cal. Comm. Code §§ 9101-507.) Self-help repossession, an ingredient of the industry, is the subject of elaborate state regulations. California authorizes self-help repossession (Cal. Comm. Code § 9503), and authorizes the creditor to obtain a deficiency judgment after sale of the repossessed automobile (*id.* § 9504). It requires that the police be notified of self-help repossessions (Cal. Veh. Code § 28) and facilitates the transfer of title to repossessed automobiles (*id.* §§ 5601, 9561). The Private Investigators and Adjusters Act (Cal. Bus. & Prof. Code §§ 7500-90) licenses repossessors and regulates their activities. A state agency conducts examinations, collects fees, disciplines licensees, and otherwise administers the regulations. (*Id.* §§ 7510-14; *see* 16 Cal. Admin. Code §§ 651-90.) The final weld of "private" action to state action is made by the statutes authorizing state licensed and regulated repossessors to carry out self-help repossession (Cal. Bus. & Prof. Code §§ 7500-90) on behalf of creditors who are given the right to use self-help unless the contract between the creditor and the debtor expressly denies them the remedy. (Cal. Comm. Code § 9503.)

California is not a neutral bystander in a contest between these private debtors and creditors. The economy of the state has become heavily dependent on the

automobile industry in all its parts, an essential feature of which is consumer credit secured by interest in automobiles. California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduces the creditors' costs of repossession, for the evident purpose of stimulating the flow of consumer credit for the benefit of the state's economy, at the expense of those whose automobiles are summarily seized. Thus, the automobile-secured credit industry in California has become a state instrumentality through which California seeks to generate public benefits. Of greater moment in this state action context, however, is that California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasi-judicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees. (*See Hall v. Garson* (5th Cir. 1970) 430 F.2d 430; *cf. Evans v. Newton* (1966) 382 U.S. 296; *United States v. Wiseman* (2d Cir. 1971) 445 F.2d 792. *See also Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715; *Terry v. Adams* (1953) 345 U.S. 461; *Williams v. United States* (1951) 341 U.S. 97.)

California's involvement in self-help repossession can be put into striking perspective by comparing these cases to *Moose Lodge*. *Moose Lodge* would have been analogous to *Adams* and *Hampton* if in *Moose Lodge* the state had not merely generally regulated the lodge, but had also, for public purposes, specifically author-

ized the lodge to discriminate on the basis of race and licensed agents of the lodge to effect that discrimination. As *Moose Lodge* itself indicates, a scheme of that kind would have brought the state squarely within the range of *Pollak*. (*Compare Moose Lodge No. 107 v. Irvis, supra* at 178-79, *with id.* at 175-76 n.3.)

Underlying the reluctance of this court to reach the state action destination to which the Supreme Court has directed us is fear that the same path will carry the Fourteenth Amendment into boundless territory. I do not share that fear. Very substantial limitations of the state action doctrine articulated by the Supreme Court in *Public Utilities Commission v. Pollak, supra,* inhere in that decision. (*See Moose Lodge No. 107 v. Irvis, supra.*) Even in those restricted instances in which private activity is drawn into the public orbit, few private acts are of the kind that could be found substantively violative of the Fourteenth Amendment. When the alleged violation of the Fourteenth Amendment lies in the procedural due process realm, flexible accommodations of the competing interests involved can be fashioned. (*See, e.g., Fuentes v. Shevin* (1972) 407 U.S. 67, 90-92; *cf. Lindsey v. Normet* (1972) 405 U.S. 65; *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174.)

We cannot permit the Fourteenth Amendment to be blunted because we fear that it may sometimes have too sharp a point. The judiciary has ample tools to halt excesses if they arise.

I would take the cases en banc, affirm *Adams,* and reverse *Hampton.*

APPENDIX C.

Memorandum Decision and Order Granting Partial Summary Judgment.

United States District Court, Southern District of California.

George T. Adams, Plaintiff, v. Richard Egley, dba et al., Defendants. Civil No. 70-345-N.

Pedro Posadas, Plaintiff, v. Star and Crescent Federal Credit Union, et al., Defendants. Civil No. 70-359-N.

Filed: Feb. 11, 1972.

The two cases presently before this court on plaintiffs' motion for partial summary judgment involve the constitutionality of California Commercial Code Sections 9503 and 9504, which provide for the repossession and disposition of collateral by a secured party after default by the debtor.[1] These lawsuits, consolidated for consideration on the basis of their similarity, represent the latest development in the continuing attack on statutory prejudgment remedies which began with the 1969 Supreme Court decision in Sniadach v. Family Finance Corporation, 395 U.S. 337. In that case a Wisconsin wage-garnishment procedure was held to constitute a taking of property without prior notice and hearing, and thus to violate procedural due process as guaranteed by the Fourteenth Amendment. The California provisions here at issue, authorizing repossession and sale without judicial process, are challenged on a like basis.

The facts of the instant cases are as follows:

1. *Adams v. Egley, et al.;* 70-345-N

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[1]The text of these provisions are set forth as an Appendix to this Memorandum.

On June 17, 1968, plaintiff Adams borrowed one thousand dollars from the Bank of La Jolla, executing a promissory note and a security agreement in favor of the bank. The terms of the security agreement provided that should the debtor fail to make payment of any part of the principal or interest as provided in the promissory note:

> ". . . the Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicle." (Security Agreement, page 2.)

At a time after execution of the note defendant Southern California First National Bank became the successor in interest to the Bank of La Jolla.

Plaintiff fell behind on his payments and defendant Egley, acting for the bank, took possession of two of the three vehicles which served as security under the agreement. They were then sold by the bank at private sale.

2. *Posadas v. Star and Crescent Federal Credit Union, et al.;* 70-359-N

On June 29, 1967, plaintiff Posadas borrowed approximately $1,300.00 from defendant Star and Crescent Federal Credit Union to buy a truck, executing a

promissory note and security agreement in favor of that defendant, pledging the truck as security.

In February, 1968, plaintiff borrowed an additional $3,339.00 from the credit union to buy an automobile, executing a separate note and security agreement, pledging the automobile as security. Both security agreements contained provisions that "in the event of default of any term or condition of this security agreement, or the promissory note aforesaid, Secured Party shall be entitled to immediate possession of said . . . property according to law. . . ."

In June, 1970, plaintiff Posadas fell behind on his payment schedules for both loans. On September 25, 1970, defendant Tipton, acting for defendant credit union, repossessed the plaintiff's truck. On December 18, 1970, plaintiff surrendered his 1968 automobile to the creditor in exchange for the return of the truck.

Before considering the constitutional aspects of the present controversy, this court must direct its attention to the question of its jurisdiction to decide the matter. Plaintiffs have asserted two bases for the founding of jurisdiction in this court: first, federal question jurisdiction under 28 U.S.C. § 1331; and second, jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The request for a statutory three-judge court pursuant to 28 U.S.C. § 2281 *et seq.* is inapposite in this case, since no action of either a state or local officer is sought to be restrained, and thus the specific requirements of that statute are not met. See Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

The federal question purportedly raised here is whether the summary repossession of plaintiffs' prop-

erty constitutes a taking without due process of law. The constitutional provision under which this action is alleged to arise and with which this court concerns itself is the due process clause of the Fourteenth Amendment, which provides that no state shall take any action which shall deprive the individual of property without due process of law. The Civil Rights sections also asserted by plaintiffs provide for a judicial remedy where one is deprived of any constitutional or statutory right by any person acting "under color of state law." It is fundamental, therefore, that for jurisdiction to lie on either ground, some significant state involvement in the alleged wrongful acts must be shown; the conduct of private individuals, however wrongful or discriminatory, does not come within the purview of those sections if the state has in no way authorized, sanctioned, or encouraged it.[2]

Southern California First National Bank, defendant in the *Adams* case, No. 71-345-N, has challenged this court's jurisdiction on the basis that under the facts of these cases no state action or action under color of state law can be shown. What is involved here, they state, are private contracts whose terms are self-executing. Unlike cases involving garnishment, replevin, claim and delivery, attachment, or distraint procedures, we deal here with repossession which is a self-help remedy: the creditor, either by himself or by means of a private collection agency, may enter the premises of a debtor, remove the designated collateral, and dispose of it, all without the aid of any state official. Nor are these

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[2]There has been substantial discussion on the differences in scope between state action necessary under § 1331 and the action under color of state law proscribed by § 1983 (see detailed discussion in Klim v. Jones, *supra*). However, that distinction need not concern us in this case.

acts of repossession solely dependent on statuory authorization as, for example, liens under Innkeeper Lien laws. Rather, repossession is specifically provided for in a signed security agreement between the parties. Thus, argue the defendants, the taking is pursuant to private agreement with no state involvement on which to found jurisdiction.

This court cannot agree, and finds the situation governed by the reasoning of the Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967). That case affirmed the constitutional infirmity of a clause in the California Constitution which prohibited restrictions on an individual's right to sell property to whomever he chooses. The Supreme Court found that this provision, enacted as a repealer of California's various anti-discriminatory housing legislation, actually served as state encouragement of private discriminations. Hence, despite the fact that all parties to the controversy in *Reitman* were private individuals not connected with the state and that no state personnel were concerned, the Court found in the mere enactment of the statute state involvement sufficient to bring the alleged discriminatory acts within the purview of the Fourteenth Amendment.

The cases here under consideration present an analogous situation. The repossessions complained of as violations of due process were ostensibly private acts pursuant to a contract. However, it cannot be seriously questioned that the presence of Sections 9503 and 9504 had a significant impact on the contents of that contract's provisions. The specific reference to the Uniform Commercial Code in the Adams contract and to "immediate possession . . . according to law" in the

Posadas contract are ample indication that in drawing up the agreements defendant creditors were "persuaded or induced to include" repossession by the fact that such repossession was permitted by statute. *Cf.* Evans v. Abney, 396 U.S. 435, 445 (1970). These Commercial Code sections set forth a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy. It is therefore apparent that the acts of repossession were made "under color of state law" as required by the Civil Rights statutes, and that the passage of Sections 9503 and 9504, which authorize such acts, are sufficient state action to raise a federal question.

This precise issue was raised in the recent case of Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). There in its consideration of the constitutionality of distraint procedures under the Pennsylvania Landlord and Tenant Act, a three-judge court found that a written lease provision permitting levies and sales did not create an independent right in the landlord to distrain. Rather, the court said:

> ". . . the tenant agrees only that the landlord has the right to act pursuant to 68 Pa. Stat. Ann. § 250.301 et seq. If this provision means anything, it means only that the tenant agrees that, in cases wherein he has defaulted, he will not object on legal grounds to the use of the statutory distress procedure." 319 F. Supp. 284, 294.

While such an approach might also be applied to the instant situation, it does not appear necessary to go this far. Even if an independent right to repossess

is created by the signed security agreement, that right is created under authority of state law, and consequently does not defeat the jurisdiction of this court.

Having settled the question of jurisdiction, I now turn to the major question presented by these cases. The issue is a simple one: whether the repossessions which occurred in the situations presently under consideration represent takings without due process of law, thus denying plaintiffs their constitutional rights. This court feels compelled to decide that they do. Sections 9503 and 9504 of the California Commercial Code, which provide for such takings, are therefore constitutionally defective and void.

The departure point for such a conclusion is, of course, the *Sniadach* opinion, and the resolution of the issues posed depends in the first instance on the scope it is to be given. Some courts have interpreted the decision narrowly, and have confined it to its own facts. *See* Burnswick Corporation v. J&P, Inc., 424 F. 2d 100 (10th Cir. 1970); Term Plan, Inc. v. Superior Court, 105 Ariz. 270 (Ariz. Sup. Ct. 1969); Michaels Jewelers v. Handy, 6 Conn. Cir. 103 (Conn. Cir. Ct., App. Div. 1970); Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970).

However, the great weight of authority, both state and federal, has taken a broader approach, seeing in *Sniadach* not a special constitutional rule for wages, but a return of "the entire domain of prejudgment remedies to the longstanding procedural due process principle which dictates that, except in extraordinary circumstances an individual may not be deprived of his life, liberty, or property without notice and hearing." Randon v. Appellate Dept., 5 C.3d 536, 541

(1971). *See also* Blair v. Pitchess, 5 C.3d 258 (1971); Larson v. Fegherston, 44 Wis. 2d 712 (Wis. Sup. Ct. 1969); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205 (Minn. Sup. Ct. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971); Laprease v. Raymours Furniture, 315 F. Supp. 716 (N.D.N.Y. 1970); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). Indeed the Supreme Court itself has used *Sniadach* as a cornerstone for the general proposition that absent some compelling state interest an individual must be accorded a reasonable opportunity to be heard before he can be deprived of some significant interest by operation of law. *See* Goldberg v. Kelly, 39 U.S. 254 (1970); Boddie v. Connecticut, 401 U.S. 371 (1971); Java v. California Department of Human Resources, 402 U.S. 21 (1971); Bell v. Burson, 402 U.S. 535 (1971). The varied nature of the cases to which the principle has been applied appears to this court a strong indication of the Supreme Court's notion of that decision's scope.

Yet the call of *Sniadach* and its progeny is not absolute. The Supreme Court in rendering its decision was careful to point out that summary procedures may well meet the requirements of due process in extraordinary situations, 395 U.S. 337, 339; and it indicated that were a statute drawn narrowly enough to meet such unusual conditions, it might pass constitutional muster. It has been suggested that since Sections 9503 and 9504 of the California Commercial Code involve only secured transactions between contracting parties they represent a situation in which the prejudgment seizure of goods without a prior hearing is valid, even under *Sniadach*.

This appears to have been the reasoning of the Tenth Circuit in Brunswick Corporation v. J&P, Inc., 424 F.2d 100 (1970), in which the court rejected the debtor's due process argument. Commenting on *Sniadach* the court stated:

> "Sniadach expressly was a unique case involving, 'a specialized type of property presenting distinct problems in our economic system.' That case involved wage garnishment without notice or hearing prior to judgment on a promissory note. It is not in the least comparable to the case here on appeal involving enforcement of a security interest. Appellants have contractually agreed that upon default, their creditor Brunswick '. . . may take immediate possession of said property [collateral] and for this purpose the Seller may enter the premises where said property may be and remove the same without notice or demand, and with or without legal process; thereupon all the rights and interests of the Buyer to and in said property shall terminate.' Appellants admit they were in default on the conditional sale, so they cannot now be heard to object to the default procedures they agreed to simply because Brunswick did utilize the legal process of replevin under bond." 424 F.2d 100, 105.

The contracting parties in the *Brunswick* case were both commercial enterprises, and the property subject to repossession consisted of bowling equipment. This was determined to be of no significance by the Southern District of Florida in Fuentes v. Faircloth, 317 F. Supp. 954 (1970), *jur. noted*, 401 U.S. 906 (1971), a decision which followed closely the reasoning in *Brunswick*, and which is presently being considered by the

Supreme Court. In *Fuentes*, the fact that the contract was between a commercial party and an individual, as opposed to the *Brunswick* situation in which two commercial parties had contracted, was held to be "a distinction without a difference as far as Due Process is concerned." 317 F. Supp. 954, 957. The *Fuentes* court affirmed its belief that prejudgment seizure is justified in certain situations, and that "replevin pursuant to a contract which authorizes a conditional seller to repossess in order to protect his security interest in the goods which are the subject of the contract is one of those situations." 317 F. Supp. 954, 958.

This court takes issue with the reasoning of both these cases on several grounds. First, *Brunswick* was decided prior to Goldberg v. Kelly, *supra*, or any of the other decisions which, as discussed above, serve to clarify the scope of *Sniadach*. The *Brunswick* court, therefore, chose to confine *Sniadach* to its facts, and found it inapplicable to a situation involving a secured transaction in which both parties presumably assented to the terms contained in the agreement. This court, having decided that *Sniadach* is of broader dimensions, does not feel that a statute providing for repossession without notice or hearing is exempt from constitutional scrutiny merely because its operation is confined to situations involving the presence of a contract.

The implication of *Brunswick* is, of course, that the debtor, by entering into the agreement, was placed on notice of the consequences of failure to perform, and that the constitutional right to notice and hearing before the removal of the property was thereby waived. However, the presumption against the waiver of constitutional rights is well settled. Glasser v. United States,

315 U.S. 60 (1942); Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1971), *prob. jur. noted,* 401 U.S. 991 (1971). While a signed contract may represent an effective waiver where the contracting parties are of equal bargaining power, it is clearly not so in all cases, particularly those involving so-called "adhesion contracts," in which the terms are specified by the seller or lender. As noted by the Supreme Court of California in Blair v. Pitchess, *supra:*

> " 'The weaker party, in need of goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntarily to terms dictated by the stronger party; terms whose consequences are often understood only in a vague way, if at all.' (Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract* (1943) 43 Colum. L. Rev. 629, 632.)" 5 C.3d 258, 275-276.

This court is not alone in failing to find an effective waiver of constitutional rights where standard-form contracts are involved. In Swarb v. Lennox, *supra,* the court held that confession of judgment clauses in signed consumer credit agreements and leases by those with incomes under ten thousand dollars did not constitute a waiver of the right to notice and hearing prior to execution on confessed judgments, since in most cases it could not be established that there was an in-

tentional relinquishment or abandonment of a known right or privilege. In Laprease v. Raymours Furniture Co., *supra*, the court in considering a replevin action based on a security agreement stated by way of dictum that, "We question that the fine print in the usual consumers conditional sales contract gives rise to a competent and intelligent waiver of a constitutional right." 315 F. Supp. 716, 724.

In Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970), the court found that written provisions in signed leases permitting a landlord to distrain for rent did not amount to a waiver by the tenant of his right to object on constitutional grounds to the statutory distress procedure. Stated the court:

> "We take judicial notice of the fact that form leases are put before tenants on an 'accept this or get nothing' basis, . . . and that tenants—who need housing—are compelled to sign. There is no freedom of contract—there is merely a freedom to adhere to the terms of the contract written by the landlord." 319 F. Supp. 284, 294.

And finally, in Blair v. Pitchess, *supra*, the California Supreme Court invalidated that state's prejudgment claim and delivery procedures despite the presence of retained title sales agreements and collateral security agreements normally involved in claim and delivery cases. It held "That the mere fact that such clases are exacted in many cases cannot render constitutional the claim and delivery law, which deprives alleged debtors of their right to due process whether or not such a purported waiver has been signed." 5 C.3d 258, 281.

While none of these cases is binding on this court, I find their reasoning persuasive. If the policy underly-

ing the decision in *Sniadach* is to provide some extra modicum of legal protection to those who live on the lower economic margins of our society, it would be illogical for the courts to be dissuaded from applying that policy by the presence of standard-form contracts which often operate most harshly on the poor. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). If the provisions of a contract can legitimize summary repossession, wage garnishment might then be valid on the same theory, as long as a private agreement could be shown. This would fly in the face of the reasoning in *Sniadach*, and is rejected by this court.

One further point which might be raised in this regard is that repossession without judicial process often results in the taking of property not specified as collateral in the security agreement. This is particularly true where the subjects of the seizure are vehicles which may have other items stored inside, as was the case in both situations presently before this court. Assuming *arguendo* that the security agreement did work a valid waiver of the constitutional right to pre-seizure notice and hearing with regard to the named collateral, no such assumption could be made as to the extraneous items, and as to these, the denial of due process is self-evident.

A second area of disagreement with the *Brunswick* and *Fuentes* decisions is the idea that the identity of the parties to the contract is of no significance. The above discussion is predicated on the existence of a standard-form contract between a corporate creditor and an individual. Where, as in *Brunswick*, the parties are both commercial entities, the bargaining power is to some degree equalized, and the purported waiver

of the constitutional right to prior notice and hearing may indeed be effective. However, the California repossession statute presently under consideration is not limited to secured transactions between parties of equal bargaining power. Thus, like the wage-garnishment statute invalidated in *Sniadach*, it is not "narrowly drawn to meet any such unusual condition," 395 U.S. 337, 339, and cannot achieve validity on this basis.

Likewise, the fact that *Brunswick* involved the repossession of bowling equipment is a significant factor not noted in *Fuentes*, and one which further distinguishes the present situation. In *Sniadach*, the property involved was wages, which the Supreme Court acknowledged was a "specialized type of property presenting distinct problems in our economic system." 395 U.S. 337, 340. Other courts have interpreted "specialized type of property" as referring to those goods which, in some vaguely defined way, are essential to the maintenance of day-to-day existence. *See* Santiago v. McElroy, *supra;* Laprease v. Raymours Furniture Co., *supra;* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). It is obvious that the bowling equipment involved in the *Brunswick* case was not the kind of property which the Supreme Court had in mind when it decided *Sniadach*. However, the security interests covered by California Commercial Code, Sections 9503 and 9504 are not confined to items of such a nonessential nature. The subjects of secured transactions are commonly household appliances, furniture, and automobiles, all of which may be considered necessaries for ordinary day-to-day living. Consequently, for this reason also, the statutes in issue fail to meet the test of narrowness established by *Sniadach*.

Thus, even though there may be situations in which Sections 9503 and 9504 would effect no violation of due process, to hold it valid on this basis would constitute extensive re-drafting by this court, and such is not the function of the judiciary. In light of *Sniadach*, then, the statutes providing for summary repossession and sale must be held unconstitutional.

Although such a conclusion appears incumbent on this court given its view of the applicable law, it is reached with no small measure or reluctance. While I applaud any effort to secure for the poor and helpless the enjoyment of their constitutional rights, it is not clear that the present trend of judicial thinking will ultimately have this effect. For those who make an earnest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession. These persons, the ostensible beneficiaries of *Sniadach* and its progeny, stand to suffer substantially in the long run, if sellers and creditors raise their prices and interest rates commensurate with the cost of the judicial process which these decisions make necessary. Further, this court cannot help but note the increasing segment of our population which has deliberately chosen to live on the lower rungs of the economic ladder, whether out of revulsion against the materialism of society or out of a lack of ambition and commitment. For these persons, whether repossession is summary in nature or the result of judicial process will, in most instances, have little significance. Whether or not the benefits of the present decision will prove sufficient to outweigh the possible costs remains to be seen.

Having decided as a matter of law that the prejudgment repossessions herein complained of were executed under color of state law, this court finds no triable issue of fact remaining in these cases. Since defendants acted pursuant to Sections 9503 and 9504 of the California Commercial Code, which have been shown to violate the due process clause of the Fourteenth Amendment, the repossessions must be held illegal. Plaintiffs are entitled to partial summary judgment on this question, and the instant motion is hereby granted.

IT IS SO ORDERED.

Dated: February 11, 1972.

/s/ Leland C. Nielsen,
LELAND C. NIELSEN,
United States District Judge

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APPENDIX

§ 9503. *Secured Party's Right to Take Possession After Default.* Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and many dispose of collateral on the debtor's premises under Section 9504. (Stats.1963, c. 819, § 9503.)

§ 9504. *Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.* (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before dis-

tribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor, and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice giving his address, a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made. Such notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor at his address as set forth in the financing statement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other se-

cured party at the address set forth in his request for notice, at least five days before the date fixed for any public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any party thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this State. If the collateral is located outside of this State or has been removed from this State, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for the sale. The secured party may buy at any public sale and if the collateral is customarily sold in a recognized market or is the subject of widely or regularly distributed standard price quotations he may buy at private sale. Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The

purchaser takes free of all such rights and interest even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings.

(a) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) In any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division. (Stats.1963, c. 819, § 9504.)

APPENDIX D.

Order Dismissing Cause for Lack of Subject Matter Jurisdiction.

In the United States District Court, for the Northern District of California.

Willie O. Hampton and Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs, v. The Bank of California, National Association, a California banking corporation, Defendants. Civil No. 71-1986 SW.

Filed: March 3, 1972.

Plaintiffs brought this action for injunctive and declaratory relief alleging that defendant's repossession of their automobile under a conditional sales contract, as authorized by California Commercial Code Section 9503 and California Civil Code Sections 2982(a)(10)(4), violates their Fourteenth Amendment rights under *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

This court was recently called upon to decide the identical issues in the case of *Oller v. The Bank of America,* No. C-70-2559 SW, decided February 28, 1970, wherein it held that jurisdiction over the subject matter was lacking inasmuch as the requisite "State action" to establish federal jurisdiction cannot be found in the repossession procedure in question.

While no motion to dismiss the instant action for lack of jurisdiction has been filed, the court is obliged to raise the matter *sua sponte. Mansfield, Coldwater & Lake Michigan Railway Company & Another v. Swan & Another,* 111 U.S. 379, 382-386 (1884).

Accordingly, for the reasons set forth in the court's memorandum of decision in *Oller v. Bank of America, supra,* this action is hereby dismissed for lack of jurisdiction over the subject matter.

It is so ordered.

Dated: March 2, 1972.

/s/ Spencer Williams
United States District Judge

APPENDIX E.

Opinion.

In the United States District Court, for the Northern District of California.

Catherine Oller, Individually and on behalf of all other persons similarly situated, Plaintiffs, v. Bank of America, et al., Defendants. No. C-70-2559 SW.

Filed: Feb. 29, 1972.

This matter comes before the Court on a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

Defendant Bank of America initiated a repossession of plaintiff's automobile under the terms of a conditional sales contract covering the purchase and sale of the subject vehicle. The contract was in the form required by the State of California's Automobile Sales Finance Act (California Civil Code § 2981 et seq.) and as required, specifically stated that: "[I]f you default in the performance of your obligation under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement."

The instrument in question is a conditional sales contract within the meaning of the Automobile Sales Finance Act (Civil Code § 2981(a)), and also comes within the definition of a "secured transaction" as used in the Uniform Commercial Code (California Commercial Code § 9102(2)). The California Commercial Code specifically provides, insofar as secured transactions are concerned, that: "Unless otherwise agreed, a secured party has on default the right to take pos-

session of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace, or may proceed by action." (California Commercial Code § 9102(2)). The California Commercial Code specifically provides, insofar as secured transactions are concerned, that: "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace, or may proceed by action." (California Commercial Code § 9503). While the right to repossess is specifically authorized by the above quoted sections, it had long been a commonly accepted contractually-based and judicially-sanctioned practice prior to such statutory authorization (See California Code, Comment to Commercial Code § 9501).

Plaintiff has attacked the authority of the Bank to repossess in a complaint for declaratory relief, claiming jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1220. Essentially, the claim is based on § 1343(3) which provides that District Courts shall have original jurisdiction of civil actions to redress the deprivation of a right privileged or immunity secured by the Constitution or any Federal statute providing for equal rights of citizens, when such deprivation is accomplished "under color of any State law." 42 U.S.C. 1983 is the statute relied upon to give such a claim for relief. It states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proceeding for redress."

In order to establish jurisdiction, therefor, the plaintiff must demonstrate that the action in question was "under color of State law" and also that such action deprives the plaintiff of a right, privilege or immunity secured by the Constitution of the United States.

It is plaintiff's contention that the Bank's repossession under the authority of the California Commercial Code Sections constitutes an action under color of State law and that such actior deprives her of a constitutionally protected right to notice and a chance to be heard prior to the taking of the vehicle. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The Court is not persuaded that the law supports either contention. Disposal of the first, however, obviates the necessity of reaching the second.

The requirement of "State action" can rarely be satisfied when the action is taken by one not a State official, *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1965). While difficult factual situations have compelled some courts to enunciate extensions of this general rule, in every such case brought to the court's attention, either a state official was acting in concert with a private individual, *Adickes v. Kress*, 398 U.S. 144 (1969); *Williams v. U.S.*, 341 U.S. 97 (1950); *Shelley v. Kraemer*, 334 U.S. 1, or the State law compelled such action, *Harrison v. Murphy*, 205 F.Supp. 449 (D. Del. 1962); *Williams v. Hot Shoppes*, 293 F.2d 835 (D.C. Cir. 1961), or the power exercised was purely of statutory as distinguished from com-

mon law or contractual origin. *DeCarlo v. Horne & Co.*, 251 F.Supp. 935 (W.D. Pa. 1966); *Klim v. Hones*, 315 F.Supp. 109 (N.D. Cal. 1970).

No such exceptional factors exist to compel a similar extension of the rule in the instant case. The Bank is not a governmental or even quasi-governmental agency; no government official acts with the Bank in the matter of repossession; the act of repossession is not compelled; the authority to repossess is based on a contractual right which had been judicially approved prior to the adoption of the statutes in question.

What we have here is a private act taken by a private organization to protect its security interest in personal property that is subject to a conditional sales contract. The courts have been almost unifo.m in refusing to color such transactions as "State actions". See *McCormick v. First Nat'l Bank of Miami*, 322 F.Supp. 604 (S.D. Fla. 1971). It is difficult to imagine any statutory provision that does not, in some way, control human relationships. To say, as plaintiff seems to contend, that all human behavior which conforms to statutory requirements is "State action" or is "under color of State law" would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well.

The Court's attention has been drawn to the recent decision by the District Court for the Southern District of California wherein the identical questions posited here were resolved in favor of the plaintiff. *Adams v. Egley, et al.*, Civil No. 70-345-N, S.D. Cal., filed February 11, 1972. While this court gives great deference to the carefully considered opinion in that case, it

respectfully declines to take a step in the same direction. In particular, the court believes that reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1966) for resolution of the jurisdictional question is misplaced. *Reitman*, which dealt with racial discrimination in violation of the due process clause, clearly presented a compelling factual situation to which the Civil Rights Acts and their jurisdictional counterparts were designed to apply. The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case.

Accordingly, defendant's motion to dismiss this action for lack of jurisdiction should be and hereby is granted.

So ordered.

Dated: February 28, 1972.

/s/ Spencer Williams
United States District Judge

APPENDIX F.

U.S. Constitution, Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Statutes Section 1979.
United States Code.
Title 42.

§ *1983. Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunies secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Business and Professions Code.

§ *7520. Necessity of license.* No person shall engage in a business regulated by this chapter; act or assume to act as; or represent himself to be a licensee unless he is licensed under this chapter; and no person shall falsely represent that he is employed by a licensee.

§ *7521. Classes of business defined; restrictions on operations of patrol officer or repossessor*

(e) A repossessor within the meaning of this chapter is a person who, for any consideration whatsoever, engages in business or accepts employment to locate or recover personal property, including but not limited to personal property registered under the provisions of the Vehicle Code, which has been sold under a conditional sales agreement or which is subject to a chattel mortgage . . .

§ *7522. Persons exempted*

This chapter does not apply to: . . .

(i) The legal owner of personal property which has been sold under a conditional sales agreement or a mortgagee under the terms of a chattel mortgage.

(j) Any bank subject to the jurisdiction of the Superintendent of Banks of the State of California or the Comptroller of Currency of the United States . . .

§ *7538.2 Inventory of personal property; date; filing; falsification or alteration.* If personal effects or other personal property, not covered by a conditional sales agreement or by a chattel mortgage, are contained in or on personal property, at the time it is recovered, a complete and accurate inventory shall be made of such personal effects or other personal property. The date and time the inventory is made shall be indicated and it shall be signed by the person or persons who recovered the personal property on behalf of the legal owner or mortgagee. The inventory shall be filed in the permanent records of the licensee and shall be made available to the director or his representatives upon demand during normal business hours. Falsification or

alteration of an inventory shall be grounds for suspension or revocation of a license.

California Civil Code.

§ 2982. *Formalities of conditional sales contracts*

(a) Form; signatures; delivery of copy of contract; contents.

(a) Every conditional sale contract for sale of a motor vehicle, with or without accessories, shall be in writing and, if printed, shall be printed in type no smaller than six point, and shall contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness. The conditional sale contract or a purchase order shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and an exact copy thereof shall be furnished the buyer by the seller at the time the buyer and the seller have signed the contract or purchase order. No motor vehicle shall be delivered under this chapter until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order and any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign, and which he has signed, during the contract negotiations. The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed. Every conditional sale contract shall contain, although not necessarily in the sequence or order set forth below, the following separate items:

. . .

10. A notice, in at least eight-point bold type if the contract is printed, reading as follows: "Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement."

§ 2983.2 Notice of Intent to sell repossessed motor vehicle; form; prerequisite to liability for delinquency

Any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, at least 10 days' written notice of intent to sell a repossessed motor vehicle must be given to all persons liable on the contract. The notice shall be *personally served* or shall be sent by *certified* mail, *return receipt requested,* directed to the address of the persons shown on the contract, unless such persons have notified the holder in writing of a different address. The notice shall set forth that there is a right to redeem the motor vehicle and the total amount required as of the date of the notice to redeem; may inform such persons of their privilege of reinstatement of the contract, if the holder extends such privilege; shall give notice of the holder's intent to resell the motor vehicle at the expiration of *10* days from the date of giving or mailing the notice, or if given by mail and either the place of deposit in the mail or the place of

address is outside of this state, the period of notice shall be *20* days instead of *10* days; shall disclose the place at which the motor vehicle will be returned to the buyer upon redemption or reinstatement; and shall designate the name and address of the person to whom payment shall be made. During the period provided under said notice, the person or persons liable on the contract may pay in full the indebtedness evidenced by the contract. Such persons shall be liable for any deficiency after sale of the repossessed motor vehicle only if the notice prescribed by this section is given within 60 days of repossession and includes the following:

1. A notice, in at least eight-point bold type if the notice is printed, reading as follows: "Notice: You are subject to suit and liability if the amount obtained upon sale of the vehicle is insufficient to pay the contract balance and any other amounts due."

2. An itemization of the contract balance and of any delinquency, collection or repossession costs and fees. In addition, the notice shall either set forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice or shall state that such a credit may be available against the amount due.

§ 2983.3 Default as prerequisite to repossession or acceleration of maturity

In the absence of default by the buyer in the performance of any of his obligations under the contract, the holder may not accelerate the maturity of any part or all of the amount owing thereunder or repossess the motor vehicle.

California Commercial Code.

§ *9501. Default; Procedure When Security Agreement Covers Both Real and Personal Property.* (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this chapter and except as limited by subdivision (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9207. The rights and remedies referred to in this subdivision are cumulative. . . .

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to redemption of collateral (Section 9506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable: . . .

(b) Subdivision (3) of Section 9504 which deals with disposition of collateral;

§ *9503. Secured Party's Right to Take Possession After Default.* Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require

the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504.

§ *9504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.* (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is

liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

California Vehicle Code.

§ *28. Notification of repossession*

Whenever possession is taken of any vehicle by or on behalf of any legal owner thereof under the terms of a security agreement or lease agreement, the person taking possession shall immediately notify by the most expeditious means available the city police department where such taking of possession occurred, if within an incorporated city, or the sheriff's department of the county where such taking of possession occurred, if outside an incorporated city, and shall within 24 hours forward a written notice to such department.

§ *5600 Transfer requirements*

No transfer of the title or any interest in or to a vehicle registered under this code shall pass, and any attempted transfer shall not be effective, until the parties thereto have fulfilled either of the following requirements:

(a) The transferor has made proper endorsement and delivery of the certificate of ownership and delivery of the registation card to the transferee as provided in this code and the transferee has delivered to the department or has placed the certificate and card in the United States mail addressed to the department when and as required under this code with the proper transfer fee, together with the amount required to be paid under Part 1 (commencing with Section 6001),

Division 2 of the Revenue and Taxation Code with respect to the use by the transferee of the vehicle, and thereby makes application for a transfer of registration except as otherwise provided in Sections 5905, 5906, 5907, and 5908.

(b) The transferor has delivered to the department or has placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of the vehicle pursuant to the sale or transfer except as provided in Section 5602.

§ *5601. Involuntary transfer*

Section 5600 does not apply to involuntary transfers, as upon the taking of possession by a secured party under a security agreement, or to transfers involving the creation of security interests subject to Chapter 3, commencing at Section 6300.

§ *5602. Requirements for releasing liability*

An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of the vehicle so as to be subject to civil liability for the operation of the vehicle thereafter by another when the owner in addition to the foregoing has fulfilled either of the following requirements:

(a) When he has made proper endorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

(b) When he has delivered to the department or has placed in the United States mail, addressed to the department, either the notice as provided in Section 5900

or Section 5901 or appropriate documents for registration of the vehicle pursuant to the sale or transfer.

§ *5909. Involuntary transfers*

(a) Whenever the title or interest of any owner or legal owner in or to a vehicle registered under this code passes to another otherwise than by voluntary transfer the new owner or legal owner may obtain a transfer of registration upon application therefor and upon presentation of the last certificate of ownership and registration card issued for the vehicle, if available, and any instruments or documents of authority or certified copies thereof as may be required by the department, or required by law, to evidence or effect a transfer of title or interest in or to chattels in such case.

(b) The department when satisfied of the genuinenes and regularity of the transfer shall give notice by mail to the owner and legal owner of the vehicles as shown by the records of the department and five days after the giving of the notice, if still satisfied of the genuineness and regularity of such transfer, shall transfer the registration of the vehicle accordingly. Such notice shall not be required for a transfer described in Section 5601.

§ *9561. Waiver of penalties on respossessed vehicle*

When a legal owner or his agent repossesses a vehicle on which renewal fees are due, the department shall waive any penalties that are due for late payment if all other fees are paid within 30 days of taking possession.

APPENDIX G.

In addition to the cases cited at pp. 8-9, *infra* are the following decisions. Finding state action are: *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D.Mass. 1973); *Michel v. Rex-Noreco, Inc.*, 12 UCC Rep. Serv. 543 (D. Vt. 1972); *Chrysler Credit Corp. v. Dinitz*, 11 UCC Rep. Serv. 627 (N.Y. Civ. Ct. 1972); *Contra. Kirksey v. Thelig*, 351 F. Supp. 727 (D. Colo. 1972); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973); *Shelton v. General Electric Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Johnson v. Associates Finance, Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973); *Calderon v. United Furniture Co.*, 371 F. Supp. 572 (S.D. Tex. 1973); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Lopez v. Inman Furniture*, No. 73-B-31 (S.D. Tex. Dec. 17, 1973); *Sanderson v. Chrysler Credit Corp.*, No. 7517-73-H (S.D. Ala., July 17, 1973); *Kasey v. Alban Motors*, No. 7493-A (W.D. Ky., Nov. 27, 1973); *Colvin v. Avco Fin'l Servs., Inc.*, 12 UCC Rep. Serv. 25 (D. Utah 1973); *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. Sup. Ct. 1973); *Brown v. United States Nat'l Bank*, 96 Ore. Adv. Sheets 1667, 509 P.2d 442 (1973); *Giglio v. Bank of Del.*, 12 UCC Rep. Serv. 934 (Del. Ch. Ct. 1973); *Plante v. Industrial Nat'l Bank*, 12 UCC Rep. Serv. 739 (R.I. Super. Ct. 1973) (by implication); *General Motors Accept. Corp. v. Waters*, Civil No. F-71795 (Gen. Sess. Ct., Davidson County, Tenn., Apr. 19, 1973); *Bryant v. United Cal. Bank*, Civil No. 10685 (Cal.

Super. Ct., Los Angeles, Mar. 1, 1973); *Preciado v. Budget Fin. Plan, Inc.*, Civil No. SM 8675 (Cal. Super. Ct. 1973) (by implication); *General Motors Accept. Corp. v. Waters*, Civil No. F-71795 (Gen. Ct., Los Angeles, Sept. 14, 1973); *Wells Fargo Bank v. Rubin*, Civil No. 949,635 (Cal. Super. Ct., Los Angeles, June 22, 1972); *Davis v. Kenneth Chevrolet*, Civil No. 998,821 (Cal. Super. Ct., Los Angeles 1972); *Stevenson v. State Fin. Adjustors*, Civil No. 39027 (Cal. Super. Ct., San Luis Obispo 1972) (by implication); *Sanders v. Crocker-Citizens Nat'l Bank*, Civil No. 258,755 (Cal. Super. Ct., Santa Clara 1972); *Kipp v. Cozens*, Civil No. P-22038 (Cal. Super. Ct., Santa Clara, June 27, 1972), *reprinted in part at* 11 UCC Rep. Serv. 1067; *Universal C.I.T. Credit Corp. v. Keller Enterprises*, Civil No. 146,371 (Cal. Super. Ct., Fresno, Sept. 5, 1973); *King v. South Jersey Nat'l Bank*, Civil No. C-1609-71 (N.J. Super. Ct., Dec. 13, 1972); *Messenger v. Sandy Motors, Inc.*, 4 CCH Sec. Tr. Guide ¶ 51,952 (N.J. Super. Ct. 1972); *Frost v. Mohawk Nat'l Bank*, 347 N.Y.S.2d 246 (N.Y. Sup. Ct. 1973) (by implication); *Yankwitt v. Franklin Nat'l Bank*, 12 UCC Rep. Serv. 1254 (N.Y. Dist.Ct., Nassau, July 9, 1973); *McCarter v. National Bank of Detroit*, No. 73-244-613 CZ (Circuit Ct. Wayne Cty., Mich., Jan. 28, 1974). Many of these cases involve interlocutory rulings by the court on procedural matters and are not expressed in written opinions.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1842

GEORGE T. ADAMS,
Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,
Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON,
Individually, and on behalf of all others similarly situated,
Petitioners,

vs.

THE BANK OF CALIFORNIA,
National Association, a California banking corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1842

GEORGE T. ADAMS,
Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,
Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON,
Individually, and on behalf of all others similarly situated,
Petitioners,

vs.

THE BANK OF CALIFORNIA,
National Association, a California banking corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Petitioners' statement of the question presented (Petition, pp. 2-3) is inaccurate. The only question considered in *Hampton v. Bank of California* by the District Court (Appendix D to Petition, p. 60) or by the Court of Appeals (Appendix A to Petition, p. 6) and the only question considered by the Court of Appeals in *Adams v. Southern California First National Bank* (ibid.) is:

> Whether the historic private remedy of peaceful self-help repossession as permitted by California Commercial Code §§ 9503 and 9504 constitutes state action within the purview of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Consequently, that is the only question before this Court.

I. APPELLATE COURT DECISIONS ON THE QUESTION PRESENTED IN THE CASE AT BAR ARE UNIFORM AND THERE IS NO NEED FOR REVIEW BY THIS COURT.

There is no need for the Court to review the decision of the United States Court of Appeals for the Ninth Circuit in the case at bar. That decision is consistent with the decision of every other circuit which has considered the question.

> *Nowlin v. Professional Auto Sales, et al.* (8 Cir. Apr. 25, 1974, Nos. 73-1348, 73-1450) 4 CCH Secured Transactions Guide ¶52,351, ... F.2d —;
>
> *Nichols v. Tower Grove Bank* (8 Cir. May 13, 1974, No. 73-1621) 4 CCH Secured Transactions Guide ¶52,355, ... F.2d .....;

Shirley v. State National Bank of Connecticut (2 Cir. 1974) 493 F.2d 739, petition for rehearing en banc denied (Mar. 29, 1974) ..... F.2d .....;
James v. Pinnix (5 Cir. June 10, 1974, No. 73-1866) ..... F.2d .....[1]

It is also consistent with every state supreme court decision of which we are aware (*Brown v. United States National Bank of Oregon* (Or. 1973) 509 P.2d 442 and *Northside Motors of Florida, Inc. v. Brinkley* (Fla. 1973) 282 So.2d 617).[2]

In each of those cases, the court held that there was no state action within the purview of the Fourteenth Amendment to the Constitution of the United States or the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Nor does the fact that this Court has granted certiorari in *Jackson v. Metropolitan Edison Company* (3 Cir. 1973) 483 F.2d 754, certiorari granted (1974) ..... U.S. ....., 94 S.Ct. 1407 (Petition, p. 10) provide reason for granting certiorari in the case at bar. That case concerns a public utility which performs a state function in providing public utility service under tariffs approved by a public utilities commission (see *Public Utilities Comm'n v. Pollak* (1952) 343 U.S. 451, 462). Consequently, the question whether

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[1]Similarly, the Eighth Circuit in *Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls.* (8 Cir. 1973) 487 F.2d 906, held that the seizure by a bank of a borrower's funds and collateral in the form of accounts receivable without notice as permitted by state statute did not constitute state action.

[2]Similarly, in *Kruger v. Wells Fargo Bank* (Apr. 26, 1974) 11 Cal.3d 352, ... P.2d ....., the California Supreme Court held that a banker's exercise of the right of setoff permitted by a statute which codified a right existing under common law was not state action.

its action in cutting off electric service to a customer in accordance with such tariffs constituted state action presents a different issue than does the case at bar.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE PERTINENT DECISIONS OF THIS COURT.

The decision of the Court of Appeals is in accord with the decisions of this Court on the meaning of state action under the Fourteenth Amendment and the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163, 173;

Adickes v. Kress & Co. (1970) 398 U.S. 144, 152, 170;

Reitman v. Mulkey (1967) 387 U.S. 369, 380;

Burton v. Wilmington Pkg. Auth. (1961) 365 U.S. 715, 722-725; and

Williams v. United States (1951) 341 U.S. 97, 99-100.[3]

In *Adickes v. Kress & Co.* (1970) 398 U.S. 144, 152, this Court held that when private individuals act jointly with state officials their action is state action under the Civil Rights Act.[4] Similarly, this Court found state action

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[3]These are the leading cases on the meaning of state action. Other cases cited by petitioners (Petition, pp. 11-12) are substantially to the same effect (see footnotes 4, 5 and 7, infra).

[4]To the same effect, see *United States v. Price* (1966) 383 U.S. 787, 799-800; *United States v. Guest* (1966) 383 U.S. 745, 756-757; and *Evans v. Newton* (1966) 382 U.S. 296, 301; cf. *Evans v. Abney* (1970) 396 U.S. 435, 444-445.

in *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 722-725, when a private restaurant which was "operated as an integral part of a public building devoted to a public parking service" (365 U.S. 724) refused service to blacks. The Court held that

> "the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment" (365 U.S. 725).

In *Williams v. United States* (1951) 341 U.S. 97, 99-100, the finding of state action was based on delegation of a public function to a private individual[5] as well as a joint action between the private individual and a public official. In the instant case, there is no suggestion that respondents were acting jointly with state officials, there is no relationship of the type deemed sufficient to constitute state action in *Burton* and there is no delegation of public function to private individuals.

Rather the state law, in accord with common-law precedents, merely permits the private action involved in these cases. At common law a private person who had title to personal property had the right to repossess that

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[5]To the same effect, see *Evans v. Newton* (1966) 382 U.S. 296, 301-302; *Terry v. Adams* (1953) 345 U.S. 461, 469-470; *Marsh v. Alabama* (1946) 326 U.S. 501, 506-509; *Smith v. Allwright* (1944) 321 U.S. 649, 663-664; and *Nixon v. Condon* (1932) 286 U.S. 73, 88-89.

property, provided it be done without breach of the peace (*Silverstin v. Kohler & Chase* (1919) 181 Cal. 51, 54, 183 Pac. 451, 452; *Liver v. Mills* (1909) 155 Cal. 459, 462, 101 Pac. 299, 300; *Crosswhite v. American Insurance Co.* (1964) 61 Cal.2d 300, 302, 392 P.2d 5, 6).[6] Should the pertinent statutes be declared unconstitutional, the respondents could still exercise their common-law rights to repossess.

The fallacy in the argument advanced by Judge Hufstedler in her dissent from denial of hearing en banc (Appendix B to Petition, pp. 34-39), a portion of which is quoted by petitioners (Petition, p. 14), is that she assumes the state has empowered private creditors to do what they could not otherwise do. As shown above, peaceful repossession is a common-law right which private individuals possess regardless of statute. Judge Hufstedler points to the regulation of repossession without discerning that these regulations do not empower private creditors to do what they could not otherwise do, but rather provide debtors protections which they do not have under common law.

Moreover, that the state has an economic interest in the automobile industry is not a reason for finding state action (Petition, p. 14); presumably most contracts made in the state benefit its economy, yet the making of a contract does not constitute state action. Clearly, this is not a *Burton* type interdependent relationship constituting state action.

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[6]The long history of the common-law right of peaceful self-help repossession or recapture is documented in 3 Holdsworth, A History of English Law (3d Ed. 1923) p. 279, and 2 Cooley's Blackstone (4th Ed. 1899) pp. 857-858.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 376, this Court affirmed a finding by the California Supreme Court that the state had so significantly involved itself in private racial discrimination as to constitute state action when it adopted a state policy of encouraging housing discrimination by amending its constitution to overturn present laws and prevent future legislation prohibiting housing discrimination. This Court noted that the California Supreme Court had found the amendment "designed to make private discriminations legally possible" (387 U.S. 375), " 'to overturn state laws that bore on the right of private sellers and lessors to discriminate' " (387 U.S. 374) and "to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property" (387 U.S. 376). It emphasized that the state was encouraging discriminatory action which had previously been illegal, and made clear that legislation, merely permitting private action was not state action. It rejected the suggestion that the state court had ruled "that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations" (387 U.S. 376).

That mere permission by the state for action by private persons—whether or not that action would otherwise violate due process—does not make private action into state action was again made clear in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163. In that case, this Court held that a state license to serve alcoholic beverages in a private club, which refused to serve blacks, was not a significant involvement constituting state action (407 U.S. 173-175).

On the other hand, the Court held that regulations of the State Liquor Control Board which required the club to adhere to provisions of its by-laws, which discriminated against blacks, constituted state action in violation of the Civil Rights Act (407 U.S. 177-179). This is in accord with the holding of *Adickes v. Kress & Co.* (1970) 398 U.S. 144, 170, that a private act is state action when the state, by its law, has compelled the act.[7] Clearly, under California law, there was no requirement that respondents take possession of the automobiles involved in the instant case.

As was pointed out by the California Supreme Court in *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, all private action undertaken pursuant to the common law does not constitute state action:

> "Our review of the cases discussing the constitutionality of prejudgment remedies further confirms our conclusion that the courts have not accepted plaintiff's claim that judicial acceptance of common law remedies constitutes state action. Of those many decisions declaring particular creditors' remedies unconstitutional, none found their rulings upon such a theory; those decisions that hold that common law self-help remedies lie beyond the scope of the Fourteenth Amendment likewise reject, either expressly or by implication, plaintiff's contention" (11 Cal.3d 364).

To hold that otherwise private action—neither compelled by, nor joined in by, the state—constitutes state action

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[7]To the same effect, see *Peterson v. Greenville* (1963) 373 U.S. 244, 247-248; *Lombard v. Louisiana* (1963) 373 U.S. 267, 273-274; *Robinson v. Florida* (1964) 378 U.S. 153, 155-156; *Shelley v. Kraemer* (1948) 334 U.S. 1, 19-20; and *McCabe v. A., T. & S. F. Ry. Co.* (1914) 235 U.S. 151, 161-162.

because it is permitted by state statutes which codify the common law would unreasonably extend the jurisdiction of the Federal courts under the Civil Rights Act. As the Court of Appeals pointed out, "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conf rms to state law to the Fourteenth Amendment would emasculate the state action concept" (Appendix A to Petition, p. 12).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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No. 73-1842

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

GEORGE T. ADAMS,
Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,
Respondent.

WILLIE O. HAMPTON AND MATTIE HAMPTON, Individually, and on behalf of all others similarly situated,
Petitioners,

vs.

THE BANK OF CALIFORNIA, National Association, A California banking corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Southern California First National Bank, respectfully prays that the petition of George T. Adams for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

OPINIONS BELOW

The opinion of the District Court is set forth in Appendix C of the Petition and is reported as *Adams* v. *Egley, et al.* at 338 F. Supp. 614. The opinion of the Court of Appeals for the Ninth Circuit, the dissenting opinion of Bryne, J., the order of the Court of Appeals denying *en banc* consideration and the dissenting opinion of Hufstedler, J. are set forth in Appendix B of the Petition and are reported at 492 F.2d 324.

JURISDICTION

The jurisdictional requisites for review in this Court are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, in light of the existence of California Commercial Code §§ 9503 and 9504, the peaceful, private repossession (through a private repossessor licensed by the State) and sale of collateral by a private secured lender, after default and pursuant to a private security agreement, is action taken "under color of" state law within the scope of 42 U.S.C. § 1983, for purposes of stating a federal claim under 28 U.S.C. §§ 1331 or 1343;

2. In the event that a federal claim is stated, whether the facts of this case present an issue as to the constitutionality of California Commercial Code § 9504; and,

3. In the event that a federal claim is stated, whether California Commercial Code §§ 9503 or 9504 are violative of the due process clause of the Fourteenth Amendment to the Constitution and, if so, to what extent.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and certain federal and state statutes are set forth in the Petition at Appendix F. Additionally, Appendix A of this Brief sets forth the provisions of 28 U.S.C. §§ 1331 and 1343.

STATEMENT OF THE CASE

On June 17, 1968, Petitioner George T. Adams borrowed $1,000.00 from the Bank of La Jolla (predecessor in interest to Respondent Southern California First National Bank). In return, Adams executed an installment note promising repayment of $48.44 per month, for a total of $1,160.16, and also executed a security agreement granting to the bank a security interest in three motor vehicles. The security agreement provides, *inter alia,* that upon default the bank shall have all of the rights and remedies of a secured party under the California Commercial Code, "or any other applicable law," and further expressly provided that upon default the bank is entitled to take possession of the vehicles. [Pet. App. 3-4.]

By January, 1970, Adams had repaid nearly $900.00 of the loan, but he then became unemployed, and no further payments were made until July 7, 1970. Between July 25 and August 17, 1970, Adams and representatives of the bank discussed his loan which then had an outstanding balance of $217.45.

On August 19, 1970, the bank, acting through Richard Egley, a repossessor licensed by the State of California, took possession of two of Adams' three vehicles covered by the security agreement. Certain miscellaneous items of personal property not cov-

ered by the security agreement were contained within the vehicles at the time of their repossession. These items of personal property were returned to Adams some six weeks later. [Pet. App. 4-5.]

The two vehicles were sold by the bank. After deducting the cost of repossessing and storing the vehicles, the net proceeds amounted to $219.15. This recovery applied against the balance due resulted in a deficiency of less than $1.00 which was cancelled. [Pet. App. 5.]

On October 23, 1970, Adams filed suit in the Southern District of California seeking damages under 42 U.S.C. § 1983 and declaratory relief under 28 U.S.C. §§ 2201 and 2202. The District Court granted Adams' motion for partial summary judgment. In so doing, the District Court found that the enactment of Commercial Code §§ 9503 and 9504 constituted sufficient involvement of the State of California to support a finding of action taken "under color of" state law so as to confer federal jurisdiction and held that Commercial Code §§ 9503 and 9504 were invalid on their face as violative of due process requirements because they failed to provide notice and opportunity for hearing to the debtor prior to repossession as the District Court believed to be required by *Sniadach* v. *Family Finance Corp.* [395 U.S. 337 (1969); Pet. App. 40.]

The bank's petition for an interlocutory appeal under 28 U.S.C. § 1292(b) was granted, and the case was consolidated on appeal with the *Hampton* case. On October 4, 1973, the Court of Appeals issued its opinion reversing the District Court decision in *Adams,* Byrne, J., dissenting. After measuring *Adams* against the facts and tests enunciated in the major Supreme Court cases dealing with state action, the Court of Appeals concluded that the

State of California was "not so significantly involved" in self-help repossession as to permit the crucial conclusion for purposes of 42 U.S.C. § 1983 that the conduct of the bank was action taken under color of state law. A petition for rehearing with suggestion for rehearing *en banc* was timely filed and denied on March 12, 1972, Hufstedler, J., dissenting. [Pet. App. A.]

ARGUMENT

I

REVIEW BY THIS COURT IS UNNECESSARY BECAUSE ITS FAMILIAR STATE ACTION HOLDINGS ARE BEING CORRECTLY AND UNIFORMLY APPLIED BY THE COURTS OF APPEALS

Since adoption of the Fourteenth Amendment and the Civil Rights Statutes, this Court has frequently been called upon to decide under what circumstances the extraordinary limitations upon governmental power found in the Constitution and federal statutes apply to private conduct. Many of the cases decided by the Court during this time, especially those involving racial discrimination, exhibit the considerable ingenuity employed to disguise activities of the State and thereby escape Constitutional strictures. These cases have produced a vast and familiar literature devoted to the distinction between private conduct and action of the State. They have required the Court to explore such diverse topics as: the authority of regular and special police officers;[1] the participation by private organizations in elections;[2] probate

[1] *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Williams* v. *United States*, 341 U.S. 97 (1951).

[2] *Smith* v. *Allwright*, 321 U.S. 649 (1944).

law;[3] leases of public property;[4] regulation of private clubs;[5] state sanitary regulations;[6] trespass statutes;[7] public utility services;[8] and "company towns".[9]

In view of the variety of state action problems which have been decided by this Court, it would require a most unusual and difficult case to present a need for further guidance. This is not such a case. With few exceptions, the many courts which have considered private nonjudicial repossession have applied existing Supreme Court decisions and found insufficient state involvement to support a federal claim. Appendix G to the Petition cites 34 lower court cases involving state action in the context of private nonjudicial repossession. Of these cases, only four trial court decisions have found sufficient state action to support a federal claim, while the other 30 decisions have found no state action. In addition to the instant cases in which the Court of Appeals for the Ninth Circuit has found a lack of state action, three other Courts of Appeals have arrived at the same conclusion. [*Nowlin* v. *Professional Auto Sales, et al.*, ...F.2d ..... (8th Cir., April 25, 1974, Nos. 73-1348, 73-1450), 4 CCH Secured Transactions Guide ¶52,351; *Nichols* v. *Tower Grove Bank*, ... F.2d ..... (8th Cir., May 13, 1974, No. 73-1621), 4 CCH Secured Transactions Guide ¶52,355; *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739 (2nd Cir. 1974), pet. for rehearing denied (March 29, 1974),

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[3] *Evans* v. *Abney*, 396 U.S. 435 (1970).

[4] *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

[5] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

[6] *Robinson* v. *Florida*, 378 U.S. 153 (1964).

[7] *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970).

[8] *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952).

[9] *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

..... F.2d .....; and *James* v. *Pinnix*, ... F.2d ..... (5th Cir., June 10, 1974, No. 73-1866).] The same conclusion was also reached by the Supreme Courts of Oregon and Florida [*Brown* v. *United States National Bank*, 96 Ore. Adv. Sheets 1667, 509 P.2d 442 (1973); *Northside Motors, Inc.* v. *Brinkley*, 282 So.2d 617 (Fla. Sup.Ct. 1973).][10]

The near unanimity of result in the Courts of Appeals and other courts indicates that there is little need for further Supreme Court guidance in this area.[11]

II

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Petitioner declares that the decision of the Court of Appeals is in conflict with applicable decisions of this Court. To the contrary, however, analysis of the decisions cited by Petitioner and the facts underlying those decisions reveals that there is no such

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[10] Appellate courts have found no state action in cases dealing with other non-judicial creditor remedies. [*Kruger* v. *Wells Fargo Bank*, 11 Cal.3d 352 (1974), banker's common law and statutory right of offset; *Fletcher* v. *Rhode Island Hospital Trust State Bank*, ... F.2d ..... (1st Cir. No. 73-1372 May 9, 1974), banker's common law right of offset; *Bichel Optical Laboratories* v. *Marquette National Bank*, 487 F.2d 906 (8th Cir. 1973), bank's seizure of accounts receivable permitted by UCC section 9-502(1).]

[11] Any need for further guidance by this Court may also be eliminated by a case currently pending on its docket. *Jackson* v. *Metropolitan Edison Company* [483 F.2d 754 (3rd Cir. 1973), *cert. granted*, ... U.S. ....., 94 S.Ct. 1407 (1974)] where a private utility company terminated electrical service to a customer for non-payment. Given the close and formalized relationship between a state and a utility, if the Court fails to find state action in *Jackson*, it is most unlikely to find that due process proscriptions will apply to private parties who contract in a manner permitted, but not required, under state law.

conflict and that the Ninth Circuit opinion is in full accord with the teaching of this Court on the subject of state action.

In one line of decisions this Court dealt with misuse of power possessed by virtue of state law and made possible only because the individual involved was clothed with the authority of state law. [*Monroe* v. *Pape*, 365 U.S. 167 (1969); *United States* v. *Guest*, 383 U.S. 745 (1966); *Griffin* v. *Maryland*, 378 U.S. 130 (1964); *United States* v. *Classic*, 313 U.S. 299 (1941); *Screws* v. *United States*, 325 U.S. 91 (1945); *Williams* v. *United States*, 341 U.S. 97 (1959).] In each of these cases the wrongdoers were either state officials themselves, or were private persons who were *directly* and *affirmatively* assisted by state officials *at the time* the deprivation of constitutional rights occurred.

In this case, the State provided no such assistance to either Egley or the bank. Neither Egley nor the bank manifested any state authority to Adams in order to accomplish the repossession nor does Adams claim to have submitted to such a manifestation. Further, state law did not clothe Egley or the bank with authority to accomplish the repossession. Rather, the source of the authority was the security agreement between the parties. The enactment of §§9503 and 9504 offered no assistance to either Egley or the bank in that the right of a secured creditor to repossess and sell personal property without judicial process had been firmly stitched into the common law of California for many years prior to the enactment of §§9503 and 9504.[12]

In another line of decisions, this Court dealt with situations where private racial discrimination was *compelled* by the State.

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[12] See *Dohrman* v. *Durston*, 90 Cal.App.2d 236 (1949); *Crosswhite* v. *American Insurance Co.*, 61 Cal.2d 300 (1964); *Liver* v. *Mills*, 155 Cal. 459 (1909); and *Silverstin* v. *Kohler & Chase*, 181 Cal. 51 (1919). For statutory authority, see Former California Civil Code §§3016.2(2), 3016.2(3)(b) and 3031.

[*Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Robinson* v. *Florida,* 378 U.S. 153 (1964); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Adickes* v. *Kress & Co.,* 398 U.S. 144 (1970); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 178-179 (1972).]

In this case there is nothing contained in §§9503 and 9504 or in any related statute or regulation which in any way compelled or commanded either Egley or the bank to take possession of or sell the vehicles. Sections 9503 and 9504 are completely permissive with respect to whether the creditor will repossess.

In yet another line of decisions, this Court dealt with situations where the State had abdicated to private individuals a function of the State which the State was *historically required to perform.* [*Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953); *Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968). Cf. *Lloyd Corporation Ltd.* v. *Tanner,* 407 U.S. 551 (1972).]

Extrajudicial repossession of collateral has *never been* a function of the State nor one which the State is historically required to perform.[13] Accordingly the State, in this case, has abdicated nothing to either Egley or the bank.

Finally, in other decisions, this Court dealt with diverse situations where the State had become involved with private conduct to an "unconstitutional degree". [*Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *Evans* v. *Newton,* 382 U.S. 296 (1966); *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). Cf. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972).]

In *Burton* v. *Wilmington Parking Authority, supra,* a virtual

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[13] See n. 12, *supra.* See also Burke & Reber, State Action, Congressional Power and Creditors' Rights: An Essay On The Fourteenth Amendment, 46 So.Cal.L.Rev. 1003 (1973).

partnership for profit existed between the State and a private restaurant which engaged in racial discrimination on premises leased from the State. The State received substantial annual rental from the restaurant and was responsible for the upkeep of the leased premises. In this case, the State had no economic interest in any part of the transaction between Adams and the bank and, accordingly, no particular interest in whether the repossession occurred.[14] Further, the repossession was accomplished without the use of state officials or property so that no state "prestige" was employed.

In *Evans* v. *Newton, supra,* the Court found that a park willed in trust for use by Caucasians only was in effect a public facility because the City of Macon had for many years physically managed and maintained the park. By contrast, the conduct of the bank in this case was not part of any state activity, and the State in no way participated in the decision to repossess. Neither had the State managed or maintained the bank or its property or rendered any physical assistance in repossession.

Reitman v. *Mulkey, supra,* was heavily relied upon by both the District Court in its opinion and by Petitioners when the case was before the Court of Appeal. In *Reitman,* the State of California had adopted a constitutional amendment which repealed legislation prohibiting discrimination in housing on account of race. The amendment also effectively prevented future legislation which would prohibit racial discrimination in housing. This Court affirmed the determination of the California Supreme Court that

[14] The observation that the State has an economic interest in the automobile industry and its secured credit industry is an empty generalization which is valueless in making state action decisions. [Pet. 14; Pet. App. 37-38.] If the State's economic interest in its industries were a criterion for determining state action, one could plausibly argue that any contract between private parties in any significant industry would be subjected to Constitutional scrutiny as though the State were a party.

the constitutional amendment would involve the State in private racial discrimination to "an unconstitutional degree".[15]

In *Reitman,* this Court noted with apparent approval the conclusion of the California Supreme Court that the State was permitted a neutral position relative to private racial discrimination and that the State was not required to have legislation prohibiting it. Measuring the facts in *Adams* by the tests in *Reitman,* it is apparent that at most the State, in enacting §§9503 and 9504, took the neutral position permitted to a state under the analysis of *Reitman.*

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[15] This Court also approved the analysis of the California Supreme Court, which examined the constitutionality of the amendment in terms of its "immediate objective," its "ultimate effect" and its "historical context and the conditions existing prior to its enactment." [387 U.S. at 373.]

The California Supreme Court found that prior to the enactment of the constitutional amendment the State of California had passed several acts regulating and prohibiting racial discrimination in the sale or rental of residential housing. The amendment was intended to, and did, establish a purported constitutional right to privately discriminate "on grounds which admittedly would be unavailable under the Fourteenth Amendment *should State action* be involved." [387 U.S. at 374.] The California Supreme Court also assessed the ultimate impact of the amendment and concluded that its enactment would "encourage and significantly involve the State" in private racial discrimination contrary to the Fourteenth Amendment.

It has been noted, *supra,* that prior to the enactment of §§9503 and 9504, a secured creditor had the right to repossess and sell personal property without judicial process under the common and statutory law of California. [See n. 12 *supra.*] Thus, no immediate or long-term objective to deprive debtors of procedural due process can reasonably be attributed to the enactors of §§9503 and 9504.

Because the enactment of §§9503 and 9504 created no rights in the secured party which did not exist under prior California law, the impact of §§9503 and 9504 in California was the creation of a mere compendium of the rights and duties of secured creditors and debtors with respect to repossession and sale of collateral. If any state policy was set forth by the enactment of §§9503 and 9504, it is that the people of California would derive benefit from a simplified compendium of California law on repossession and sale of collateral which would be uniform with other states.

Although the California Supreme Court has not considered the impact of §§9503 and 9504 in the California environment, its recent decision in

(This footnote is continued on next page)

In *Moose Lodge No. 107* v. *Irvis, supra,* this Court rejected the argument that pervasive and detailed state regulation of the operations of a private club holding a liquor license was sufficient to find that racial discrimination by the club was state action. Similarly, the statutes relied upon by Petitioner to illustrate "pervasive state regulation" furnish no basis for charging the State with the conduct of the bank because they regulate peripheral details of repossession and do not approve, compel, facilitate or encourage repossession.[16]

III

REVIEW OF NONJUDICIAL REPOSSESSION WOULD BE PREMATURE

Assuming that this Court were to accept the *Adams* case for review and determine that there was sufficient state involvement to support a claim under 42 U.S.C. §1983, the Court would be

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Kruger v. *Wells Fargo Bank* [11 Cal.3d 352 (1974)] is instructive in its analysis of the nonjudicial remedy of the banker's right of setoff. That remedy had been partially codified in Code of Civil Procedure §440.

Comparing § 440 with the constitutional amendment in *Reitman,* the court noted:

"Former §440, on the other hand, took a neutral stance. Recognizing the established principle of equity that either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, the statute merely establishes a procedure for asserting such a setoff under the code pleading system of California. Since it does not alter the substantive law of setoff, we see no basis for finding that §440, or its successor §431.70, was intended to, or did, *encourage* banks or other creditors to exercise their right of setoff without notice to the debtor." [11 Cal.3d at 362].

The California Supreme Court also went on to note that insofar as the remedy derived from common law, judicial acceptance of common law remedies does not constitute State action. The analysis in *Kruger* compels the conclusion that the California Supreme Court would likewise conclude that enactment of §§9503 and 9504 did not involve the State in the conduct of the bank to an unconstitutional degree.

[16] California Commercial Code Sections 9503 and 9504 merely codified

(This footnote is continued on next page)

faced with deciding whether to consider if a substantive deprivation of due process had occurred.

The Court's most recent decision in the area of civil due process carefully noted several studies and draft legislation concerning summary creditor remedies. *Mitchell* v. *W. T. Grant Co.*, [..... U.S. ....., ..., n. 13, 42 U.S.L.W. 4671, 4677, n. 13 (1974).]

> "As revealed in the various studies and proposals, the principal question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and more particularly, of the mix of procedural requirements necessary to minimize the cost. The commentators are in the throes of debate, see e.g., Symposium, Creditors Rights, 47 So.Calif.Law Rev. 1-164 (1973), and basic questions remain unanswered. See generally, Note, Self-Help Repossession; the Constitutional Attack, the Legislative Response and the Economic Implications, 62 Geo.L.J. 273 (1973).
>
> "We indicate no view whatsoever on the desirability of one

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existing commercial practices. [See n. 12 *supra*.] With the exception of §9504(3), there is no requirement that security agreements comply with those sections. To the extent that §9504 (and California Civil Code §2983.2) require notice to the debtor and sale "in a commercially reasonable manner," they only serve to restrict the creditor's remedy. Additionally, California Civil Code §2982(a)(10) merely requires that if the parties agree to a repossession provision they so state in their contract.

California Business and Professions Code §§7520 et seq. confer no right or power upon secured parties to repossess collateral but merely require that repossessors be licensed. The licensing of repossessors, together with provisions prescribing minimum standards of character, experience and conduct, also comprise restrictions upon the secured party, who prior to their enactment was presumably able to hire anyone he chose to perform repossession tasks.

California Vehicle Code §28, requiring that police be notified of a repossession, does not aid repossession but is a regulatory measure enacted by the State for its own benefit. The clear purpose of the statute is to protect the State from needless expenditure of time and funds in attempting to locate missing vehicles which had been rightfully repossessed.

Likewise, Vehicle Code §§ 5600, 5602, 5609 and 9561 provide no aid, comfort or incentive to secured parties. They simply provide a statutory scheme of registration after title has passed by operation of law.

Any statutory authorization for deficiency judgments has no application to either *Adams* or *Hampton*. In neither case did the banks seek a judgment of any type against the Petitioners.

> or more of the proposed reforms. The uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule. Our holding in this case is limited to the constitutionality of Louisiana sequestration procedures."[17]

The Court in *Mitchell* made clear that notice and opportunity for hearing are not in every case the indispensible safeguards required to assure due process. If the Court proceeds to consider this case, it will do so prior to receiving the benefit of the research and debate now under way.

Further, there are a number of shortcomings in the present posture of this case which would preclude effective review on the merits by this Court.

First, the decision of the Court of Appeals did not reach the substantive due process issue because it decided there was insufficient state involvement to support a federal claim under 42 U.S.C. §1983. The District Court opinion did address substantive due process, but the deficiency relied upon was the failure to afford notice and opportunity for hearing prior to repossession under the authority of *Sniadach* v. *Family Finance Corp., supra.* The opinion in *Mitchell* now makes it clear that notice and opportunity for hearing is not a *sine qua non* of substantive due process. That decision declares that resolution of the due process problem "must take account not only of the interests of the buyer of the property but those of the seller as well". [..... U.S. at ....., 42 U.S.L.W. at 4673.]. Because the *Mitchell* case was very recently decided, the lower courts had no opportunity to consider its impact.

Petitioner in the District Court and in the Court of Appeals

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[17] Mr. Justice White, author of the majority opinion in *Mitchell,* articulated a similar respect for the study and judgment of those who "have wrestled with these problems so long and often" in his dissent in *Fuentes* v. *Shevin* [407 U.S. 67, 103 (1972).]

strenuously argued that the *only* way to assure due process was to provide prior notice and opportunity for hearing. Petitioner has with apparent ease shifted gears and now adopts *Mitchell* as the criterion for deprivation of substantive due process. The lower courts and the other parties to this appeal, however, have not had the benefit of a full exploration of substantive due process principles under the current law, and thus *Adams* lacks sturdy lower court underpinnings for a decision on substantive due process.

Additionally, the District court opinion was issued prior to the opinion of this Court in *Fuentes* v. *Shevin* [407 U.S. 67 (1972)], where, as in *Mitchell*, the only question considered was whether a violation of substantive due process occurred. The *Fuentes* decision emphasized that a significant element of deprivation of due process there was the fact that the State through its officers intervened on the side of one party to a private dispute. The officers were empowered to use force if necessary to seize the goods. By invoking state power, as in *Fuentes*, the creditor is in an immensely more powerful position relative to the debtor, and the debtor has no choice but to surrender his property.

> "The replevin of chattels, as in the present cases, may satisfy a debt or settle the score. But state intervention in the private dispute hardly compares to state action furthering a war effort or protecting the public health." [407 U.S. at 92-93.]
>
> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." [407 U.S. at 93.]

The instant action presents a wholly different situation in which the private parties to a dispute are not aided in any manner by the State. The principal statute under attack, California Commercial Code Section 9503, prescribes that nonjudicial repossession may only occur where there will be no breach of the peace. As a practical matter, this means that the debtor is on an even footing with his creditor. Most goods, such as the household articles discussed in *Fuentes*, are inside the debtor's home and thus immune from nonjudicial repossession. As to automobiles, the most common type of property subject to nonjudicial repossession, the debtors are free to conceal them from their creditors or lock them in their garages, thereby precluding nonjudicial repossession.

CONCLUSION

Petitioner's extravagant view of state action would place all individuals under the strictures of Due Process concepts for no more substantial reason than speculation about the interest of the State in its economic well-being. A causal connection between any act of the State and the repossession of automobiles by the bank is clearly lacking. All appellate courts which have considered the issue have rejected petitioner's position. No further instruction by this Court is needed. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

UNITED STATES CODE

Title 28

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

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IN THE

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October Term, 1973
No. 73-1842

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Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,

Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON, individually, and on behalf of all others similarly situated,

Petitioners,

vs.

THE BANK OF CALIFORNIA, National Association, a California banking corporation,

Respondent.

Motion for Permission to File Brief Amici Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief Amici Curiae.

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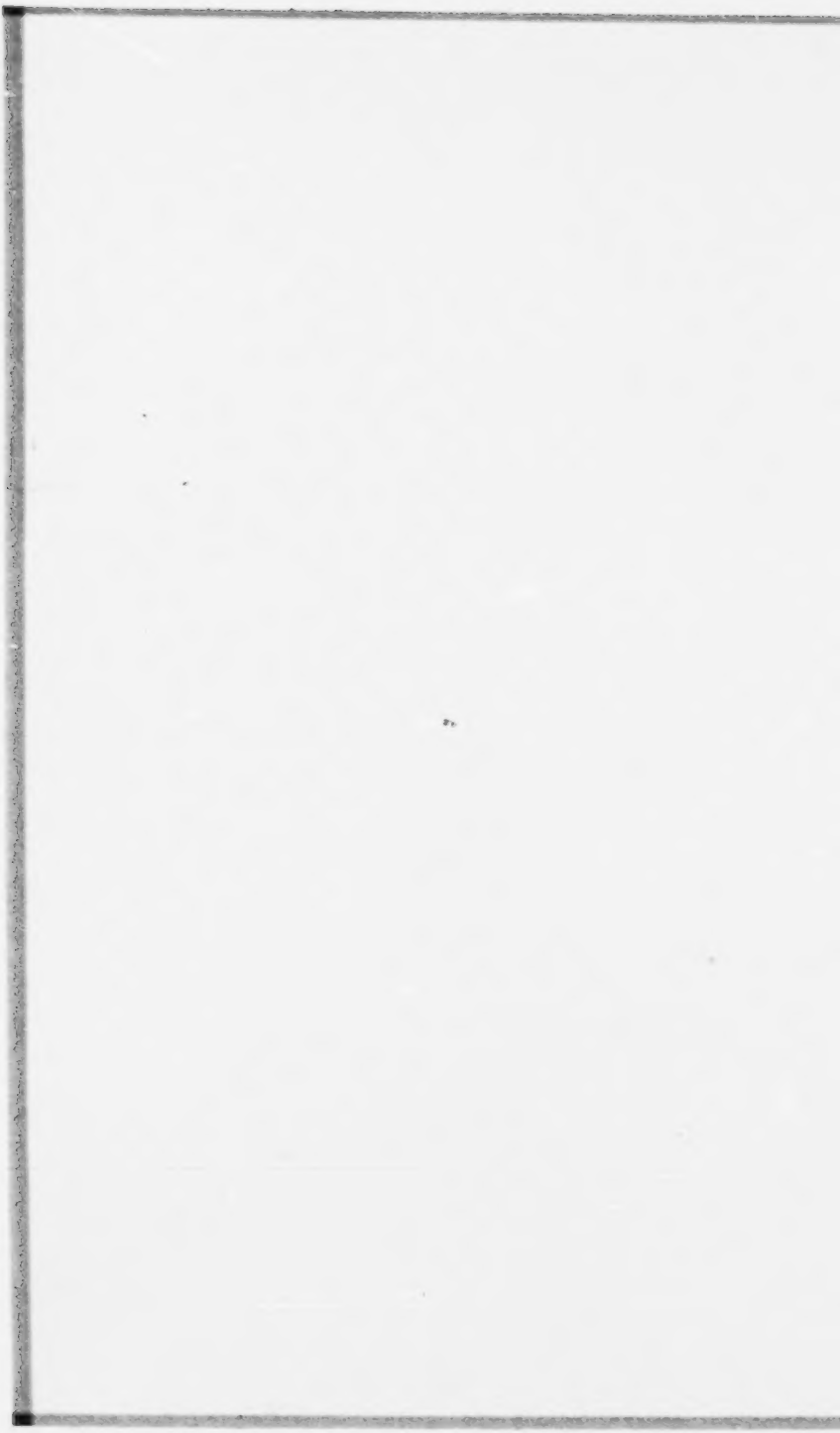

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Respondent.

Motion for Permission to File Brief Amici Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, Ford Motor Credit Company, General Motors Acceptance Corporation and Chrysler Credit Corporation (herein collectively referred to as "Amici") move this Court for permission to file a Brief Amici Curiae in this case in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by

Petitioners. In support of this motion, Amici respectfully allege as follows:

1. Ford Motor Credit Company is a subsidiary of Ford Motor Company and provides wholesale financing to qualified Ford Motor Company franchised dealers, purchases retail installment sales paper from them and engages in all forms of commercial and industrial financing.

2. General Motors Acceptance Corporation is a subsidiary of General Motors Corporation and is engaged in the business of financing the distribution of new products manufactured by General Motors Corporation to General Motors franchised dealers for resale and of purchasing such dealers' retail installment sales contracts covering new as well as used products sold by such dealers.

3. Chrysler Credit Corporation is a subsidiary of Chrysler Financial Corporation which is a wholly owned subsidiary of Chrysler Corporation. Chrysler Credit Corporation is engaged in the business of wholesale financing of Chrysler dealers and of purchasing retail installment sales contracts covering new cars and used cars of any manufacture sold by such dealers.

4. In connection with their business, Amici retain security interests in all forms of personal property including automobiles, trucks, farm equipment and other products. Their dealer financing plans provide a valuable service without which dealers would find it difficult or impossible to stock products for sale at retail.

5. At the end of the year 1973, Amici had a combined total of approximately $19,040,000,000 in retail and wholesale credit outstanding in the United States,

substantially all of it secured by some form of personal property. Of that total, approximately $12,623,000,000 consisted of retail credit primarily associated with the financing of new and used automobile purchases.

6. Amici would be substantially and adversely affected in connection with the above financing by any decision denying their contractual right to exercise private and peaceful self-help repossession where their debtors are in default.

7. The complaints filed with the District Courts in these cases challenge the constitutionality of the private and peaceful self-help repossession of Petitioners' automobiles as authorized by the security agreements they signed. The complaints are representative of scores of other complaints filed in federal and state courts throughout the United States challenging the constitutionality of self-help repossession. A list of cases known to Amici involving the constitutionality of self-help repossession is attached to the Brief as Appendix A. Amici are involved as party defendants in many of these cases.

8. Amici are familiar with the factual and legal issues raised in the *Adams* and *Hampton* cases having filed an Amici Curiae Brief in support of the Bank in *Adams v. Southern California First National Bank* and having participated in the oral argument of these cases before the United States Court of Appeals for the Ninth Circuit.

9. Amici have read the Petition for a Writ of Certiorari filed here and believe that additional argument in support of the Petition is needed concerning the national importance of the unresolved federal questions raised in these cases, the need for clarification of decisions of this Court concerning the issues raised herein,

and the potentially dispositive impact that a ruling by this Court would have upon the future course of other cases pending throughout the United States involving the constitutionality of various forms of self-help creditor remedies.

10. Amici, who are taking the unusual position of supporting review by this Court of a decision of the Court of Appeals in which they wholly concur, have been unable to secure the permission required by Rule 42(1) of the Rules of the Supreme Court of the United States.

11. Amici therefore respectfully request that this Court grant them permission to file an Amici Curiae Brief in support of the Petition for a Writ of Certiorari. The Brief, which is submitted with this Motion and has been served upon Petitioners and Respondents, is limited in scope to setting forth the reasons why a writ of certiorari should be granted. Amici will move this Court for permission to file a full brief on the merits of the "state action" and Due Process issues raised herein should the Petition for a Writ of Certiorari be granted and such a motion be necessary.

Dated: July 5, 1974.

Respectfully submitted,

GEORGE R. RICHTER, JR.,

Counsel for Amici Curiae Ford Motor Credit Company, General Motors Acceptance Corporation and Chrysler Credit Corporation.

Of Counsel:
SHEPPARD, MULLIN, RICHTER & HAMPTON.

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I.

Introductory Statement.

A. Statement of Position and Interest of Amici Curiae.

This Amici Curiae Brief is filed by Ford Motor Credit Company, General Motors Acceptance Corporation and Chrysler Credit Corporation (herein collectively referred to as "Amici") pursuant to Rule 42(1) of the Rules of the Supreme Court of the United States. Amici filed a Brief in support of Respondent in *Adams v. Southern California National Bank* and participated in the oral argument of that case and its consolidated

companion, *Hampton v. Bank of California*, in the Court of Appeals. (These cases are hereinafter collectively referred to as "*Adams*".)

Amici fully endorse the decision and opinion of the Court of Appeals in *Adams* but are taking the unusual position here of supporting the Petition for a Writ of Certiorari to review the Ninth Circuit's decision because of the importance of having this Court rule on the state action issues raised by this case. The importance of the case is reflected by the fact that this Court has cited *Adams* in two of its recent decisions involving debtor attacks on creditor remedies. *Fuentes v. Shevin*, 407 U.S. 67, 72 n.5 (1972); *Mitchell v. W. T. Grant Co.*, ... U.S. ...., 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974).

Amici are engaged in the business of wholesale financing of motor vehicle dealers and of purchasing retail installment contracts covering new and used cars sold by the dealers. In connection with this business, Amici retain security interests in all forms of personal property, including automobiles, trucks, farm equipment and other products. Amici would be substantially and adversely affected in connection with their business activities by any decision denying their contractual right to exercise private and peaceful self-help repossession in the enforcement of the foregoing security interests in personal property.

Amici are presently parties to numerous lawsuits in federal and state courts across the country in which their private and peaceful repossession of collateral, after default by their debtors, has been challenged under the Due Process Clause of the Fourteenth Amendment. Amici are adversely affected both by the

proliferation of such litigation and the uncertainty created thereby.

B. Statement of the Case.

Adams began with complaints filed in United States District Courts challenging the constitutionality under the Due Process Clause of the repossession of Petitioners' motor vehicles by Respondents. The repossessions, which were expressly authorized by the security agreements signed by Petitioners, were accomplished privately, peacefully and without any form of assistance, cooperation or participation by any officer or agent of the State. In *Adams v. Southern California First National Bank*, the District Court for the Southern District of California nevertheless held that the Bank's self-help repossession of Petitioner's automobiles is "state action" violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Hampton v. Bank of California*, the District Court for the Northern District of California reached the opposite conclusion.

Both cases were appealed and consolidated by the Court of Appeals for purposes of oral argument and decision. On October 4, 1973, the Court of Appeals filed its Opinion concluding that the exercise of the right of self-help repossession does not constitute "state action":

> [T]he State of California is not so significantly involved in the self-help repossession procedures undertaken by the creditors in these cases to permit this court to find the state action or conduct taken under color of state law required to establish a federal cause of action.
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> 492 F.2d at 329.

The Court therefore reversed the decision of the District Court in *Adams* and affirmed the District Court's decision in *Hampton*.

On October 16, 1973, Petitioners filed in the Court of Appeals a petition for rehearing with a suggestion for rehearing en banc. On March 12, 1974, the petition for rehearing was denied by a majority of the panel and the request for en banc consideration was rejected by a majority of the members of the Ninth Circuit in active service with only one member of the Court expressing a dissenting view. The Petition for a Writ of Certiorari was then filed with this Court.

C. Related Petitions for Writs of Certiorari.

In an opinion filed on April 25, 1974, the United States Court of Appeals for the Eighth Circuit, finding no state action, dismissed constitutional attacks in two consolidated cases involving self-help repossessions that had taken place in Nebraska and Missouri. *Nowlin v. Professional Auto Sales, Inc.*, App. No. 73-1348 (8th Cir., April 25, 1974), and *Mayhugh v. Bill Allen Chevrolet*, App. No. 73-1450 (8th Cir., April 25, 1974), *summarized at* 4 CCH Sec. Tr. Guide ¶52,351. A different panel of the Eighth Circuit came to the same conclusion in a separate opinion filed on May 13, 1974 in *Nichols v. Tower Grove Bank*, App. No. 73-1621 (8th Cir., May 13, 1974), *summarized at* 4 CCH Sec. Tr. Guide ¶52,355. A Petition for a Writ of Certiorari to the Eighth Circuit is now pending before this Court to review the decision in the *Nowlin* case (No. 73-1897).

On February 14, 1974, the United States Court of Appeals for the Second Circuit filed its decision in *Shirley v. State National Bank*, 493 F.2d 739 (2d Cir.

1974), affirming a lower court dismissal of an action attacking the constitutionality of the self-help repossession remedy. The Court found no state action present in the self-help repossession of plaintiff's automobile, rejecting many of the same state action arguments that had been made by Petitioners in *Adams*. On March 29, 1974, the Court denied a petition for rehearing in *Shirley* and rejected a suggestion that the case be reheard en banc. Three members of the Court dissented from the order rejecting en banc consideration of the case. The plaintiff in *Shirley* has secured an extension of time to and including August 26, 1974, in which to file a Petition for a Writ of Certiorari to the Second Circuit.

Finally, on June 10, 1974, the United States Court of Appeals for the Fifth Circuit filed its opinion in *James v. Pinnix*, App. No. 73-1866 (5th Cir., June 10, 1974), holding that a private creditor's exercise of his right of self-help repossession does not constitute state action.

These cases present closely related if not identical state action issues and, should certiorari be sought and granted in any or all of them, they should be consolidated for purposes of oral argument and decision.

II.

The Decision of the Court of Appeals Is Correct, but the Petition for a Writ of Certiorari Should Nevertheless Be Granted for Purposes of Affirming That Decision and Thereby Settling an Important Question of Constitutional Law.

In June of 1969, this Court rendered its decision in *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), invalidating under the Due Process Clause

the Wisconsin wage garnishment statute. The *Sniadach* case was followed, and its holding was greatly expanded, three years later in *Fuentes v. Shevin*, 407 U.S. 67 (1972), in which this Court held the Florida and Pennsylvania replevin statutes unconstitutional. Those statutes authorized state agents in a statutory replevin action to seize property from a debtor upon the ex parte application of the creditor.

The *Sniadach* and *Fuentes* decisions resulted in a host of attacks throughout the country upon a wide variety of prejudgment creditor remedies involving the active intervention of state officials upon behalf of creditors. State action is clearly present in such cases because the taking of the debtor's property is accomplished by the State through its agents. The sole issue in these cases is therefore whether the particular creditor remedy under attack satisfies the requirements of the Due Process Clause. This Court's recent decision in *Mitchell v. W. T. Grant Co.*, ... U.S. ...., 42 U.S.L.W. 4671 (U.S. May 13, 1974), outlines a number of the factors to be weighed in making this determination.

The *Sniadach* and *Fuentes* cases, however, have had repercussions extending far beyond assaults upon prejudgment remedies executed through state processes. A number of creditor remedies have come under attack which, unlike the processes challenged in *Sniadach*, *Fuentes* and *Grant*, do not involve the state in the actual seizure or disposition of the debtor's property. Central to a determination of constitutional challenges to these private "self-help" creditor remedies will be an examination of the nature, extent, purpose and significance of the state's involvement, if any, with these remedies because the Due Process requirements of the

Fourteenth Amendment apply only as limitations on "state action", not private action. *Sniadach, Fuentes* and *Grant* did not deal with this issue because "state action" was clearly present in the challenged takings of property involved in those cases, although this Court's references to the *Adams* case in *Grant* and in the majority and dissenting opinions in *Fuentes* seem to recognize that self-help remedies are not subject to the strictures of the Fourteenth Amendment. *See Mitchell v. W. T. Grant Co.*, ... U.S. ...., 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974); *Fuentes v. Shevin*, 407 U.S. 67, 79 n. 12, 102 (1972).

Clearly, the most widespread Due Process attack upon creditor remedies is the assault upon self-help repossession. Scores of cases have been filed throughout the country challenging the constitutionality of this creditor remedy. Amici have listed in Appendix "A" the cases known to Amici where the exercise of this remedy has been challenged under the Fourteenth Amendment and where the constitutional issues of state action and Due Process have accordingly been presented for judicial resolution. Certiorari should be granted in this case so that this Court may finally pass on the constitutionality of self-help repossession, thereby preventing the needless expenditure of substantial federal and state judicial resources.

The judicial economies that will be realized by this Court's final resolution of the state action issues raised in *Adams* are illustrated by reference to another case presently before the Court. On February 25, 1974, this Court entered an order in *Gonzalez v. Mercantile National Bank* postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. 42 U.S.L.W. 3484 (U.S. Feb. 25, 1974)

(No. 73-858). The amended class action complaint filed in the *Gonzalez* case challenges the constitutionality of the repossession provisions of the Illinois Uniform Commercial Code and the Illinois Vehicle Code, and raises substantive issues virtually identical to the issues involved in *Adams*. However, the three-judge District Court did not reach the merits of these claims, as did the Ninth Circuit in *Adams*, but instead dismissed the amended complaint on procedural grounds, holding that:

> (1) The plaintiffs lack standing to challenge the constitutionality of the Uniform Commercial Code and Vehicle Code sections involved because those sections allow repossession and transfer of title by the Secretary of State only upon default and the plaintiffs allege in their amended complaint that they were not in default at the time of the repossession;
>
> (2) The plaintiffs also lack standing to seek any declaratory and injunctive relief as to Counts 1 and 2 of the amended complaint because the challenged conduct—repossession and transfer of title—had already occurred so that granting declaratory and injunctive relief would be a useless act; and
>
> (3) Both the class and individual aspects of the action should be dismissed—as to the class since the plaintiffs lack standing themselves and can thus not represent the class and as to the named plaintiffs because they "fail to present a claim which can be reached on the merits." *Mojica v. Automatic Employees Credit Union*, 363 F. Supp. 143, 146 (N.D. Ill. 1973).

Gonzalez filed an appeal from the foregoing decision under 28 U.S.C. Section 1253. The Bank filed a motion to dismiss the appeal upon the ground that 28 U.S.C. Sections 1253 and 2281, read together, permit an appeal only from an order of a three-judge District Court granting or denying injunctive relief against a state officer on constitutional grounds and only from decisions on the merits. All parties agree that the order dismissing the amended complaint in *Gonzalez* was not based on constitutional grounds and was not a decision on the merits; and the Bank contends that the Illinois Secretary of State was merely a nominal defendant since his action in transferring title had nothing to do with the creditors' conduct in repossessing the motor vehicles.

If this Court ultimately accepts jurisdiction in the *Gonzalez* case, the order of the three-judge District Court presents only the foregoing procedural issues of standing and mootness. The basic underlying claim that self-help repossession is unconstitutional is not presented in *Gonzalez* in its present posture. However, should this Court grant certiorari in *Adams* and affirm the decision of the Court of Appeals, it will have resolved the underlying constitutional claim in *Gonzalez* and that case could then be dismissed for lack of a substantial federal question.

III.

The Petition for a Writ of Certiorari Should Be Granted to Clarify Previous Decisions of this Court Dealing with the "State Action" Requirement of the Fourteenth Amendment.

In attempting to establish the presence of "state action" in the private exercise by a creditor of his right to take possession of collateral upon the debtor's de-

fault, the Petitioners in *Adams*—and debtors generally in the vast number of cases raising the issue—have relied upon a wide variety of statements drawn from almost every state action decision rendered by this Court in the last three decades. Amici respectfully submit that this Court's previous decisions developing the "state action" doctrine, particularly when considered against the background of the history and purposes of the state action requirement, compel the conclusion that state action is not present in the exercise of self-help repossession. Certiorari should be granted for the purpose of clarifying the scope and thrust of these state action decisions.

Five basic theories of state action have been relied upon by debtors in attacking self-help repossession. *First*, debtors argue that state action is present in a creditor's exercise of his right of self-help repossession because the State has enacted Sections 9-503 and 9-504 of the Uniform Commercial Code, which provisions permit creditors to repossess and sell collateral upon the debtor's default under certain limited conditions. The debtors contend that these sections of the Code authorize and encourage self-help repossession and thereby significantly involve the State in the repossession under this Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967). Amici respectfully submit that the decision in *Reitman* does not support this broad theory of state action and that the Court should grant certiorari in *Adams* and so hold.

While the State has "acted" in enacting Sections 9-503 and 9-504 of the Uniform Commercial Code, just as the state "acted" in *Reitman* by enacting a state constitutional amendment, the presence or absence of

"state action" under the Fourteenth Amendment must be determined by a careful analysis of the relationship between the challenged conduct and the state's involvement, if any, with that conduct. In *Reitman,* the issue was the constitutionality of Proposition 14, an amendment to the California Constitution which operated to overturn existing fair housing legislation and to forbid the future enactment of such laws by the State or any subdivision of the State. By constructing a state constitutional roadblock to the achievement through normal political process of fair housing legislation by minority groups, the State acted in *Reitman* in violation of the Equal Protection Clause of the Fourteenth Amendment. In other words, in *Reitman,* the constitutional amendment *itself* had a discriminatory effect on the political process, and it was this effect that made that amendment constitutionally infirm.

The challenged conduct in *Adams,* on the other hand, is the repossession of Petitioners' motor vehicles, and this was accomplished privately by the creditors pursuant to written agreements signed by Petitioners. Sections 9-503 and 9-504, in contrast to Proposition 14 involved in *Reitman,* merely codify and restrict in favor of debtors a pre-code common law remedy which had its origins in the early laws of the Greeks, Romans, French and English. *See* McCall, *The Past as Prologue: A History of the Right to Repossess,* 47 So. Cal. L. Rev. 58 (1973). Sections 9-503 and 9-504 of the Uniform Commercial Code do not have an unconstitutional effect—they do not, for example, result in a taking of property. The fact that these Code sections permit the challenged private conduct does not render that conduct "state action" since most forms of purely

private behavior, including the making of contracts and wills, are permitted in some sense by state laws and a contrary ruling would emasculate the Fourteenth Amendment distinction between state and private behavior.

In reaching its decision in *Reitman*, this Court relied heavily upon the decision of the California Supreme Court in *Mulkey v. Reitman*, 64 Cal. 2d 529 (1966), and particularly upon the California Supreme Court's factual and legal evaluation of the state action and Equal Protection issues involved in the case. It is therefore significant that the California Supreme Court has recently held in a unanimous opinion that *Reitman* does not support the proposition that state action can be found in the fact that private conduct is authorized by legislative enactment. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 361-362 (1974).

Second, the debtors have argued that Sections 9-503 and 9-504 of the Code, when read together with state laws and regulations concerning motor vehicle installment sales and the licensing of repossessors, create a "symbiotic relationship" between the State and the secured creditor so that the latter's conduct is state action under this Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). This Court should grant certiorari in *Adams* and hold that *Burton* will not bear such a broad construction. Secured creditors are not located on land owned by public authorities and are not part of a continuing public enterprise, as were the defendants who were charged with racial discrimination in *Burton*. This Court expressly recognized in *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), that a finding of state action could not be

based upon state licensing and pervasive regulation of private parties absent some direct and significant involvement by the State in the particular challenged conduct. This applies with particular force in a case such as *Adams* where the state laws and regulations relied upon by the debtors to supply the necessary state action are, for the most part, restrictive of creditor rights and were enacted primarily for the benefit of debtors. In such a case, the real complaint is that the State has not gone far enough in regulating creditor remedies, not that the restrictions imposed by the State on the exercise of those remedies are themselves objectionable. Clearly, such state inaction does not provide the state action necessary to bring the Due Process Clause of the Fourteenth Amendment into play.

Third, debtors have argued that a finding of state action can be predicated upon the theory that creditors in repossessing automobiles are performing a "public function" and must therefore be deemed state agents under this Court's decisions in *Marsh v. Alabama,* 326 U.S. 501 (1946), *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), *Evans v. Newton,* 382 U.S. 296 (1966), and *Terry v. Adams,* 345 U.S. 461 (1953). Amici respectfully submit that such a broad "public function" theory of state action has never been endorsed by this Court and urge the Court to grant certiorari in *Adams* and so hold. The decisions of this Court relied upon by debtors in support of their "public function" theory involve unique factual situations, and their limited spheres of operation have been recognized by the subsequent decisions of this Court in *Lloyd Corp., Ltd. v. Tanner,* 407 U.S. 551 (1972), *Central Hardware Co.*

v. NLRB, 407 U.S. 539 (1972), and *Palmer v. Thompson*, 403 U.S. 217 (1971). Even assuming, however, that there is a broad "public function" theory of state action, an historical analysis of the repossession remedy demonstrates beyond doubt that repossession is not, and has never been, a function traditionally or historically performed by the State.

Fourth, debtors have argued that state action is present by reason of state laws permitting the registration of the transfer of title to a motor vehicle after its repossession and sale by the creditor. This argument must also be rejected upon a careful analysis of the relationship between motor vehicle registration laws and the challenged repossession. The registration takes place only *after* the repossession and sale have occurred, and its only purpose is to give evidentiary effect to what has been previously accomplished by purely private action. Possession and title to the motor vehicle pass independently of the registration process. The entire registration system is designed to protect innocent purchasers of motor vehicles, to protect the public by affording identification of vehicles and of responsible persons in case of accidents or violations of the law, to protect the registered owner after a transfer takes place, and to prevent the theft of motor vehicles. Registration systems must make some provision for involuntary transfers of title if they are to serve adequately the foregoing purposes. To predicate a finding of state action upon motor vehicle registration laws would render every private sale of a

motor vehicle and every private sale of a parcel of real property state action subject to Fourteenth Amendment review in the federal courts merely because of the State's willingness to record prior transfers of title in its public records.

Fifth, the debtors point to the ability of creditors to seek and obtain a deficiency judgment after a repossession if the proceeds from the sale of the collateral are insufficient to satisfy the outstanding indebtedness. They argue that, under *Shelley v. Kraemer*, 334 U.S. 1 (1948), such judicial action constitutes state action under the Due Process Clause. Amici submit, however, that the mere availability to the creditor of access to the judicial system in common with all others does not supply the state action necessary to launch a Fourteenth Amendment attack on his private and peaceful repossession and sale of collateral. A deficiency judgment is sought, if at all, only after the challenged repossession and sale have already occurred by purely private action. And, such a judgment can be obtained only upon bringing a civil suit, and after all of the Due Process requirements of notice and hearing have been provided to the debtor during the course of that proceeding.

* * *

The preceding sketch of arguments that have been made in *Adams* and other cases challenging the constitutionality of self-help repossession illustrate the importance of granting certiorari in *Adams* to clarify the meaning and scope of past state action decisions of this

Court, developed primarily under the Equal Protection Clause, as applied to a case involving the Due Process Clause.

IV.

A Decision by this Court in Adams Should Provide Substantial Guidance to other Courts in Cases Involving Challenges to other Forms of Self-Help Creditor Remedies.

Due process attacks upon self-help remedies have not been confined to self-help repossession. Other forms of self-help creditor remedies similar to self-help repossession have come under constitutional attack, including trust deed foreclosure pursuant to a private power of sale clause in a deed of trust as permitted and restricted by state statutory law; set-off of mutual indebtedness as permitted by state statutory and/or judicial law; and private enforcement of a wage assignment agreement as permitted and restricted by state statutory law. A list of the cases known to Amici where the constitutionality of these remedies has been challenged is set forth in Appendix "B" to this Brief. Amici respectfully submit that a ruling by this Court in *Adams* would have an important if not decisive impact upon most of these cases because of the similarity of the state action and other issues they raise.

V.

The Adams Case Raises Substantially Different Issues From the Jackson Case and Although Briefs and Argument in Adams May Be Helpful to the Court in Deciding Jackson these Cases Should Not Be Consolidated.

The state action issues raised in *Jackson v. Metropolitan Edison Company,* now pending before this

Court (No. 73-5845), are substantially different from the issues raised in *Adams*. In *Jackson*, this Court will decide whether a public utility's termination of electrical service for nonpayment of a bill is state action under the Due Process Clause. To establish state action in *Jackson*, Petitioner places principal reliance upon the following factual allegations:

> (1) Public utilities are chartered and issued certificates of convenience to serve the public interest rather than the private interests of their incorporators;
>
> (2) Public utilities hold exclusive state franchises within their service areas and because of this state granted monopoly are not subject to competition and the private controls of the market economy;
>
> (3) Public utilities are guaranteed a fair rate of return by the State's regulatory rate structure; and
>
> (4) Public utilities perform an essentially "public" service by dispensing a product which is absolutely essential to the health and well-being of a community which has no alternative source for the purchase of that product.

None of these facts are present in *Adams*. Furthermore, in *Adams*, the creditors acted pursuant to express contractual authority contained in the controlling security agreements, a fact not present in *Jackson*.

Amici believe that the decision of the Court of Appeals in *Jackson* is correct and should be affirmed. Amici also believe that the briefs filed in *Adams* may be helpful to this Court in its resolution of *Jackson*. At the same time, however, Amici respectfully submit

that the state action issues raised in *Jackson* are sufficiently different from those raised here that certiorari should be granted in *Adams,* and *Adams* should not be consolidated with *Jackson* for purposes of oral argument or decision.

VI.

Conclusion.

For the reasons set forth above, Amici respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted and the decision of the Court of Appeals should be affirmed.

Dated: July 5, 1974.

Respectfully submitted,

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APPENDIX "A".

Constitutional Attacks Upon Self-Help Repossessions.

1. *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973).

2. *Aguilar v. United California Bank*, Civ. No. 55321 (Cal. Super. Ct.).

3. *Akins v. Ford Motor Credit Company*, Civ. No. 74LM8 (Ill. Cir. Ct.).

4. *Anderson v. General Motors Acceptance Corporation*, Civ. No. C86134 (Cal. Super. Ct.).

5. *Arban v. General Motors Acceptance Corporation*, Civ. No. 72 216-694CZ (Mich. Cir. Ct.).

6. *Bailey v. Ford Motor Credit Company*, Civ. No. 762206 (Wash. Super. Ct.).

7. *Baker v. Keeble*, Civ. No. 998-E (M.D. Ala.).

8. *Ball v. Ford Motor Credit Company*, Civ. No. 73L8616 (Ill. Cir. Ct.).

9. *Bank of America v. Bright*, Civ. No. 45276 (Cal. Super. Ct.).

10. *Barnes v. General Motors Acceptance Corporation*, Civ. No. 72-C1-729 (Ohio Ct. Com. Pleas).

11. *Bell v. General Motors Acceptance Corporation*, Civ. No. 73CV537-W-3 (W.D. Mo.).

12. *Bennett v. Hutchinson's Quality Auto Sales, Inc.*, Civ. No. 72-865 (M.D. Fla.).

13. *Black v. General Motors Acceptance Corporation*, Civ. No. 74-99 (D.S.C.).

14. *Bogan v. Ford Motor Credit Company*, Civ. No. 904691 (Tex. Dist. Ct.).

15. *Boland v. Essex County Bank and Trust Company*, Civ. No. 72-3299-G (D. Mass.).

16. *Brantley v. Union Bank and Trust Company,* 362 F. Supp. 355 (M.D. Ala. 1973).

17. *Brown v. United States Nat'l Bank,* 96 Ore. Adv. 1667, 509 P.2d 442 (1973).

18. *Brunell v. Security Pacific Nat'l Bank,* Civ. No. 54763 (Cal. Super. Ct.).

19. *Bryant v. United California Bank,* Civ. No. 10685 (Cal. Super. Ct.).

20. *Bueno v. General Motors Acceptance Corporation,* Civ. No. 10270 (Utah Dist. Ct.).

21. *Bullshows v. Ford Motor Credit Company,* Civ. No. 7698 (Montana Dist. Ct.).

22. *Callan v. Security Pacific Nat'l Bank,* Civ. No. 20973 (Cal. Super. Ct.).

23. *Calloway v. Ford Motor Credit Company,* Civ. No. 937,619 (Cal. Mun. Ct.).

24. *Chatman v. General Motors Acceptance Corporation,* Civ. No. C-24512 (Mich. Dist. Ct.).

25. *Chrysler Credit Corp. v. Dinitz,* 11 UCC Rep. 627 (N.Y. Cir. Ct.).

26. *Cole v. Ford Motor Credit Company,* Civ. No. 7326B (Tex. Dist. Ct.).

27. *Colvin v. Avco Fin'l Servs., Inc.,* 12 UCC Rep. 25 (D. Utah 1973).

28. *Combs v. Ford Motor Credit Company,* Civ. No. 7361-9353 (Tex. Dist. Ct.).

29. *Cook v. Lilly,* App. No. 13413 (W. Va. Sup. Ct.).

30. *Coomes v. Chrysler Credit Corp.,* Civ. No. 15672 (D. Conn.).

31. *Couch v. Ford Motor Credit Company,* Civ. No. 73-1892-CA(L)01 (Fla. Cir. Ct.).

32. *Davidson Chevrolet, Inc. v. Cook*, Civ. No. 72 CVD 2901 (N.C. Jus. Ct.).

33. *Davis v. Kenneth Chevrolet*, Civ. No. 998,821 (Cal. Super. Ct.).

34. *Devilliers v. Chrysler Credit Corp.*, Civ. No. 73-875-E (W. D. Okla.).

35. *Draper v. Ford Motor Credit Company*, Civ. No. 420351 (Cal. Super. Ct.).

36. *Dublin v. Redstone Federal Credit Union*, Civ. No. 72-2726-RJK (C.D. Cal.).

37. *Ferm v. Ford Motor Credit Company*, Civ. No. NWC-27326 (Cal. Super. Ct.).

38. *Flores v. Commercial Credit*, Civ. No. C35107 (Cal. Super. Ct.).

39. *Ford Motor Credit Company v. Wollenberg*, Civ. No. 769411 (Mo. Cir. Ct.).

40. *Franchino v. Ford Motor Credit Company*, Civ. No. B34546 (Ohio Mun. Ct.).

41. *Frost v. Mohawk Nat'l Bank*, 347 N.Y.S.2d 246 (N.Y. Sup. Ct. 1973).

42. *Gary v. Darnell*, Civ. No. 7752-B (W.D. Ky.).

43. *General Motors Acceptance Corporation v. Ikner*, Civ. No. 86632-1972 (N.Y. Civ. Ct.).

44. *General Motors Acceptance Corporation v. Jones*, Civ. No. M273 656 (Ind. Mun. Ct.).

45. *General Motors Acceptance Corporation v. Smith*, Civ. No. 1833 (Miss. Dist. Ct.).

46. *General Motors Acceptance Corporation v. Waters*, Civ. No. F-71795 (Tenn. Gen. Sess. Ct.).

47. *Gibbs v. Titelman*, 13 UCC Rep. 401 (E.D. Pa. 1973).

48. *Giglio v. Bank of Delaware*, 307 A.2d 816 (Del. Ch. Ct. 1973).

49. *Goodman v. General Motors Acceptance Corporation*, Civ. No. 74CV41-W-4 (W.D. Mo.).

50. *Goret v. Ford Motor Credit Company*, Civ. No. 16-430 (N.M. Dist. Ct.).

51. *Grant v. General Motors Acceptance Corporation*, Civ. No. 962,733 (Tex. Dist. Ct.).

52. *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972).

53. *Gross v. Ford Motor Credit Company*, Civ. No. 5173-427 (Ind. Super. Ct.).

54. *Harness v. Ford Motor Credit Company*, Civ. No. C38026 (Cal. Super. Ct.).

55. *Heinicke v. Ford Motor Credit Company*, Civ. No. 774403 (Wash. Super. Ct.).

56. *Helfinstine v. Ford Motor Credit Company*, Civ. No. C-73-805 (Okla. Dist. Ct.).

57. *Hill v. General Motors Acceptance Corporation*, Civ. No. 58958TD (Tenn. Cir. Ct.).

58. *Hill v. Michigan Nat'l Bank*, Civ. No. 5306 (Mich. Ct. App.).

59. *Hinton-Cox Pontiac, Inc. v. Parsons*, Civ. No. 8843 (Ark. Sup. Ct.).

60. *Huber v. Union Planters Nat'l Bank*, Civ. No. C-72-264 (W.D. Tenn.).

61. *Huggins v. General Motors Acceptance Corporation*, Civ. No. 959,221 (Tex. Dist. Ct.).

62. *Hunter v. General Motors Acceptance Corporation*, Civ. No. 177,580 (Ky. Cir. Ct.).

63. *Ingram v. Ford Motor Credit Company*, Civ. No. 73064C (S.D. Miss.).

64. *James v. Pinnix*, App. No. 73-1866 (5th Cir. June 10, 1974).

65. *Johnson v. Associates Finance, Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973).

66. *Johnson v. Ford Motor Credit Company*, Civ. No. 481460 (Ga. Civ. Ct.).

67. *Kabase v. General Motors Acceptance Corporation*, Civ. No. CA-73L1168 (N.D. Ala.).

68. *Kelley v. Bank of America National Trust & Savings Association*, Civ. No. 55288 (Cal. Super. Ct.).

69. *Kelley v. Kent's Used Cars*, Civ. No. 326,933 (Cal. Super. Ct.).

70. *Kinch v. Chrysler Credit Corporation*, 4 CCH Sec. Tr. Guide ¶52,248 (E.D. Tenn. 1973).

71. *King v. General Motors Acceptance Corporation*, Civ. No. 8613 (Ark. Cir. Ct.).

72. *King v. South Jersey Nat'l Bank*, Civ. No. C-1609-71 (N.J. Super. Ct.).

73. *Kipp v. Cozens*, 11 UCC Rep. 1067 (Cal. Super. Ct.).

74. *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972).

75. *Ladd v. Ford Motor Credit Company*, Civ. No. 27987 (Cal. Mun. Ct.).

76. *Langston v. Ford Motor Credit Company*, Civ. No. K7072CA8 (W.D. Mich.).

77. *Leiger v. General Motors Acceptance Corporation*, Civ. No. 6540 (Va. Cir. Ct.).

78. *Lyon v. Wells Fargo Bank*, Civ. No. EAC 14269 (Cal. Super. Ct.).

79. *Marable v. General Motors Acceptance Corporation,* Civ. No. 153-24030-74 (Tex. Dist. Ct.).

80. *Marshall v. Stephens Buick Company,* Civ. No. 690598 (Minn. Dist. Ct.).

81. *Mayhugh v. Bill Allen Chevrolet Co.,* App. No. 73-1450 (8th Cir. April 25, 1974).

82. *Mayhugh v. Bill Allen Chevrolet,* Civ. No. 780,610 (Mo. Cir. Ct.).

83. *McCormick v. First Nat'l Bank,* 322 F. Supp. 604 (S.D. Fla. 1971).

84. *McDuffy v. Worthmore Furniture Co.,* Civ. No. 73-426-R (E.D. Va.).

85. *Meighan v. General Motors Acceptance Corporation,* Civ. No. 56601 (N.Y. Civ. Ct.).

86. *Messenger v. Sandy Motors, Inc.,* 4 CCH Sec. Tr. Guide ¶51,952 (N.J. Super. Ct. 1972).

87. *Michel v. Rex-Noreco, Inc.,* 12 UCC Rep. Serv. 543 (D. Vt. 1972).

88. *Miller v. Wohlforth,* Civ. No. 72-3001 (Alaska Super. Ct.).

89. *Mojica v. Automatic Employees Credit Union,* 363 F. Supp. 143 (N.D. Ill. 1973), *appeal filed sub-nom. and determination of jurisdiction deferred to hearing of the case on the merits,* 42 U.S.L.W. 3484 (U.S., Feb. 25, 1974) (No. 73-858).

90. *Molina v. Bank of Hawaii,* Civ. No. 73-3936 (D. Hawaii).

91. *MSR Enterprises, Inc. v. General Motors Acceptance Corporation,* Civ. No. 73-CVS-2203 (N.C. Gen. Jus. Ct.).

92. *Murphy v. General Motors Acceptance Corporation,* Civ. No. 2753 (Ky. Cir. Ct.).

93. *Neal v. Bob Eddy Buick Company*, Civ. No. 73-0843 (Ohio Ct. Com. Pleas).

94. *Nolen v. General Motors Acceptance Corporation*, Civ. No. 750,221 (Mo. Cir. Ct)

95. *Nichols v. Tower Grove Bank*, App. No. 73-1621 (8th Cir., May 13, 1974).

96. *Nicholson v. General Motors Acceptance Corporation*, Civ. No. 72-H-1558 (S.D. Tex.).

97. *Northside Motors of Florida, Inc. v. Brinkley*, 282 So.2d 617 (Fla. 1973).

98. *Nowlin v. Prof. Auto Sales, Inc.*, Civ. No. 73-1348 (8th Cir., April 25, 1974).

99. *Oberer v. Ford Motor Credit Company*, Civ. No. 73-CI11730 (Tex. Dist. Ct.).

100. *Oliver v. Mossy Oldsmobile, Inc.*, Civ. No. 923,623 (Tex. Dist. Ct.).

101. *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

102. *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972).

103. *Peguese v. Ford Motor Credit Company*, Civ. No. 73-771 (S.C. Civ. Ct.).

104. *Pemberton v. Potamkin Cadillac Leasing Corporation*, Civ. No. 1945-74 (N.Y. Sup. Ct.).

105. *Plante v. Ind. Nat'l Bank*, 12 UCC Rep. 739 (R.I. Super. Ct. 1973).

106. *Porras v. Ford Motor Credit Company*, Civ. No. 72-C-65 (S.D. Tex.).

107. *Preciado v. Budget Fin. Plan, Inc.*, Civ. No. SM 8675 (Cal. Super. Ct.).

108. *Price v. Ford Motor Credit Company*, Civ. No. B-83842 (Ga. Super. Ct.).

109. *Qualls v. Ford Motor Credit Corp.*, Civ. No. 6880 (E.D. Tenn.).

110. *Rivers v. General Motors Acceptance Corporation*, Civ. No. 73 CV-03-1004 (Ohio Ct. Com. Pleas).

111. *Roussin v. General Motors Acceptance Corporation*, Civ. No. CT-73-625 (Mich. Dist. Ct.).

112. *Russell v. American Fletcher Financial Corporation*, Civ. No. 1P 73-C-561 (S.D. Ind.).

113. *Russell v. Ford Motor Credit Company*, Civ. No. 760312 (Wash. Super. Ct.).

114. *Sanders v. Crocker-Citizens Nat'l Bank*, Civ. No. 258,755 (Cal. Super. Ct.).

115. *Sanderson v. Chrysler Credit Corporation*, Civ. No. 7517-73-H (S.D. Ala.).

116. *Shelton v. General Electric Credit Corporation*, 350 F. Supp. 1079 (M.D. Ga. 1973).

117. *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974).

118. *Span v. Ford Motor Credit Company*, Civ. No. CD-72-A-7637 (Ind. City Ct.).

119. *Spring v. Dick Balch Chevrolet*, Civ. No. 773887 (Wash. Super. Ct.).

120. *Stegell v. Ford Motor Credit Company*, Civ. No. C-74-307 (Okla. Dist. Ct.).

121. *Stevenson v. State Fin. Adjustors*, Civ. No. 39027 (Cal. Super. Ct.).

122. *Stokes v. Ford Motor Credit Company*, Civ. No 73M1-134148 (Ill. Cir. Ct.).

123. *Thomas v. Ford Motor Credit Company*, Civ. No. C-51184 (Cal. Super. Ct.).

124. *Thrower v. Ford Motor Credit Company*, Civ. No. LR74C-21 (E.D. Ark.).

125. *Thurman v. Ford Motor Credit Company*, Civ. No. 41164 (Ga. Super. Ct.).

126. *Turner v. Impala Motors*, Civ. No. C-73-50 (W.D. Tenn.).

127. *Underwood v. Ford Motor Credit Company*, Civ. No. 74-81 (Ark. Cir. Ct.).

128. *Universal C.I.T. Credit Corp. v. Keller Enterprises*, Civ. No. 146,371 (Cal. Super. Ct.).

129. *Walker v. Wells Fargo Bank, N.A.*, Civ. No. EAC 15244 (Cal. Super. Ct.).

130. *Wells Fargo Bank v. Rubin*, Civ. No. 949,-635 (Cal. Super. Ct.).

131. *Widmer v. General Motors Acceptance Corporation*, Civ. No. 15246-1972 (N.Y. Sup. Ct.).

132. *Williams v. Ford Motor Credit Company*, Civ. No. 7777-73-P (S.D. Ala.).

133. *Williams v. Motorist Insurance Corporation*, Civ. No. 73 CI 570 (Ohio Ct. Com. Pleas).

134. *Wilson v. Ford Motor Credit Company*, Civ. No. 54775 (Cal. Super. Ct.).

135. *Windsor v. General Motors Acceptance Corporation*, Civ. No. 25815 (Ala. Cir. Ct.).

136. *Yankwitt v. Franklin Nat'l Bank*, 12 UCC Rep. 1254 (N.Y. Dist. Ct.).

APPENDIX "B."

Constitutional Attacks Upon Other Self-Help Creditor Remedies.

Trust Deed Foreclosure

1. *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970).

2. *Logan v. Short*, 342 F. Supp. 1349 (E.D. Mo. 1972).

3. *Hoffman v. United States Department of Housing & Urban Development*, Civ. No. CA-7-878 (N.D. Tex., Feb. 6, 1974).

4. *Law v. United States Department of Agriculture*, Civ. No. 1486 (N.D. Ga., Jan. 28, 1974).

5. *Northrip v. Federal National Mortgage Association*, Civ. No. 40074 (E.D. Mich., Feb. 28, 1974).

6. *Global Industries, Inc. v. Harris*, Civ. No. .... (N.D. Ga., May 22, 1974) *summarized at* 42 U.S.L.W. 2632.

7. *Strutt v. Ontario Sav. & Loan Ass'n*, 11 Cal. App. 3d 547, 90 Cal. Rptr. 60 (1970).

8. *Ruff v. Lee*, 230 Ga. 426, 197 S.E.2d 376 (1973).

9. *Giordano v. Stubbs*, 228 Ga. 75, 184 S.E.2d 165 (1971), *cert. denied*, 405 U.S. 908 (1972).

10. *Great Falls Nat'l Bank v. McCormick*, 152 Mont. 319, 448 P.2d 991 (1968).

11. *Federal Nat'l Mortgage Ass'n v. McMillan*, Civil No. 12624 (App. Dep't. Los Angeles, Jan. 6, 1971), *cert. denied*, 402 U.S. 936 (1971).

12. *MCA, Inc. v. Universal Diversified Enterprises Corp.*, 27 Cal. App. 3d 170, 103 Cal. Rptr. 522 (1972).

Setoff of Mutual Indebtedness

1. *Bichel Optical Laboratories v. Marquette National Bank*, 487 F.2d 906 (8th Cir. 1973).

2. *Fletcher v. Rhode Island Hospital Trust National Bank*, App. No. 73-1372 (1st Cir., May 9, 1974).

3. *Jojola v. Wells Fargo Bank*, Civ. No. C-71-900 SAW (N.D. Cal., May 8, 1973).

4. *Russell v. American Fletcher Financial Corporation*, Civ. No. IP 73-C-501 (S.D. Ind., April 29, 1974).

5. *Lagulla v. Security Pacific National Bank*, Civ. No. 73-184-FW (C.D. Cal.)

6. *Wagner v. Bankers National Life Insurance Company*. Civ. No. 73-2449 WPD (C.D. Cal.)

7. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352 (1974).

8. *Bates v. Bank of America*, Civ. No. 640-885 (San Francisco Super. Ct.).

9. *Bookman v. Wells Fargo Bank*, Civ. No. 641-015 (San Francisco Super. Ct.).

10. *Sweeting v. Bank of America*, Civ. No. 251-351 (Santa Clara Super. Ct.).

11. *Allied Sheet Metal Fabricators, Inc. v. Peoples National Bank*, 14 U.C.C. Rep. 432 (Wash. Ct. App. 1974).

12. *Gerald v. Security Pacific National Bank*, Civ. No. 42346 (Los Angeles Super. Ct.).

13. *Pusharic v. Security Pacific National Bank*, Civ. No. CA 000058 (Los Angeles Super. Ct.)

Wage Assignments

1. *Bond v. Dentzer*, 494 F.2d 302 (2d Cir. 1974) *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S., June 10, 1974) (No. 73-1848).

2. *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W.Va. 1973).

3. *Exton v. Michigan Fidelity Loan*, Civ. No. G 36-72 (W.D. Mich. 1972).